No. 1220

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,

*Appellant,*

*vs.*

CHAS. F. MAGAHA and WM. ELLIOTT,

*Appellees.*



## TRANSCRIPT OF RECORD.

**Upon Appeal from the United States District Court for the District of Alaska, Second Division.**

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

Records of Circuit Court

of Appeals

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# INDEX

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

**Stipulation Enlarging Time to File Transcript.**

It is hereby stipulated by and between the above-named parties, appellant and respondents, that the time for the petitioners in error to file the transcript of the record, and to docket the above-entitled cause on appeal with the clerk of the Circuit Court of Appeals for the Ninth Circuit, may be enlarged to and including the 16th day of August, 1905.

Dated at Nome, Alaska, this 11th day of July, A. D. 1905.

A. J. BRUNER,
Attorney for Appellant.
IRA D. ORTON,
Attorney for Respondents.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondents. Stipulation. Filed July 22, 1905. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

**Order Enlarging Time to File Transcript.**

Now, at this day, comes the appellant by A. J. Bruner, Esq., of counsel, and upon the written stipulation of counsel for the appellant and respondents, and thereupon, this cause coming on to be heard upon the motion of said stipulation for the extension of time in which to file the transcript herein, in the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to August 16th, 1905.

ALFRED S. MOORE,

Judge of the District Court, for the District of Alaska, Second Division.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondent. Order Enlarging Time to File Transcript. Filed July 22, 1905. F. D. Monckton, Clerk.

*In the United States District Court, in and for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

## Complaint.

Plaintiff complains and alleges:

I.

That he is the owner in fee of that certain placer mining claim and ground situated in the Cape Nome Recording District, District of Alaska, and more particularly described as being Marion Bench Claim situated on the right limit of Peluck creek, the same having been located by J. P. Currie on the 12th day of July, A. D. 1899, and the certificate of location of which was recorded on the 10th day of August, A. D. 1899, at page 87, volume 16, Records of Cape Nome Recording District, and which is hereby referred to and made a part hereof.

II.

That on the 5th day of December, 1903, at Nome, Alaska, the said plaintiff made his certain lease of the above-described premises to the above-named defendants in words and figures following;

"MINING CLAIM LEASE.

This indenture, made and entered into this fifth day of December, A. D. 1903, by and between Stanley Kuzek of Nome, District of Alaska, party of the first part, herein called the lessor, and Chas. F. Magaha and Wm. Elliott, of Nome, District of Alaska, party of the second part, hereinafter called the lessee, witnesseth:

That the said lessor, for and in consideration of the royalties to be paid and the covenants to be performed by the said lessee, as hereinafter stated, hereby lease, demise and let *under* the said lessee, Magaha & Elliott, that certain placer mining claim and ground situate in the Cape Nome Recording District, District of Alaska, and known as Marion Bench Claim, on right limit of Peluck creek, located by J. P. Currie on the 12th day of July, A. D. 1899, recorded on 10th day of August, A. D. 1899, at page 87, vol. XVI, in the office and records of the recorder of the Nome Recording District, together with all the rights and privilege of entering upon and over the said property and to prospect the same for gold and the precious metals in whatever deposits the same may be found, and to mine and extract the same.

To have and to hold unto the said lessee for the period of date hereof or until noon of the fifth day of June, A. D. 1904, unless sooner terminated by forfeiture or mutual agreement. In consideration of such lease and privileges the said lessee covenant and agree to and with the said lessor as follows:

First.—To enter upon said mining claim and premises on or before the 10th day of December, A. D. 1903, and to at once begin to prospect and exploit the same for the purpose of discovering thereon placer deposits of gold or other valuable minerals and to continue such work with due diligence as long as the weather and circumstances in the community will permit.

Second.—To work and mine the said premises as aforesaid steadily and continuously from the date of such entry with at most eight men employed thereon continuously working at least eight during the months of working seasons.

Third.—To work said mining claim and premises, hereby leased, in the most practicable manner known to good mining in said district, and to such extent as to develop said property and to produce therefrom the greatest values in ores and minerals.

Fourth.—To pay the said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904, with privileges to sluice what dumps they have left. And that the lessor may have due and sufficient notice of all cleanups and be present in person or by his legal representatives at each and every cleanup.

Fifth.—To deliver the said premises with the appurtenances and all improvements, except machinery placed thereon, to said lessor in good order and condition at the expiration of this lease.

The right is reserved by the said lessor to enter upon and over said property at all reasonable times for the

purpose of inspection and for the purpose of obtaining access to and from any other property owned or operated by the said lessor.

This lease and the privileges hereby granted shall not be assignable, except with the consent of the said lessor, and in the event of a sale of the above described property, this lease shall at once cease and determine upon the payment by the said lessor to the said lessee — per cent of the sale price of the said property.

In witness whereof, we have hereto set our hands and seals this fifth day of December, A. D. 1904.

STANLEY KUZEK.
CHAS. F. MAGAHA.
WM. ELLIOTT,
Party Second Part.

Signed, sealed and delivered the presence of:
Mrs. BERTHA KUZEK."

III.

That under and in pursuance of the provisions of said lease the above-named defendants entered into the possession of the above-described premises on or about the 10th day of December, 1903, and ever since said time have been in the possession of the same and working and mining and operating the same, and have extracted therefrom a large quantity of gravel and earth containing gold in large quantities therein.

IV.

That on or about the 18th day of May, 1904, the above-named defendants began sluicing and washing the

aforesaid auriferous gravel and earth for the purpose of obtaining the gold therefrom, and have since said time continually sluiced said dumps to as great an extent as the water would permit.

V.

Plaintiff further alleges that on the 23d day of May, 1904, the above-named defendants, having made a clean-up of 54 8-160 ounces of gold from the above-described dumps upon said premises, in company with the plaintiff, carried the same to the Alaska Banking and Safe Deposit Company's office in Nome for the purpose of having the same assayed and selling the same to said bank and dividing the proceeds thereof between the plaintiff and the defendants. That since said 23d day of May, 1904, said defendants have continued to sluice the aforesaid dumps upon said premises, and upon this 28th day of May, 1904, brought into the town of Nome, in company with this plaintiff, about 35 pounds of gold. That said golddust so taken out by said defendants and brought to the town of Nome, as aforesaid, was of the value of about $8,525.00.

VI.

Plaintiff further alleges that on both the above-named occasions, the 24th day of May, 1904, and the 28th day of May, 1904, he demanded that the said defendants pay and deliver to him the amount of gold coming to him under the provisions of said lease, to wit, 75 per cent of the gross amount thereof, to wit, the sum of about $6,057.00. That upon making said demand the above-

named defendants refused to make a division of said golddust with the plaintiff, but on the contrary, refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust or the proceeds thereof; and upon his making further demand, that on this 28th day of May, 1904, the said defendants took all of said golddust from his possession by means of force and arms, and have threatened to, and unless restrained by the order of this Court, will convert the entire proceeds thereof to their own use.

VII.

Plaintiff further alleges that at the time he made said demand for his proportion of the proceeds resulting from said cleanups, to wit, the amount of 75 per cent thereof, that both of said defendants set upon the plaintiff and beat and wounded and knocked him down, and refused to deliver any portion of said proceeds thereof to this plaintiff.

VIII.

Plaintiff further alleges that the remaining dumps upon said above-described premises are very rich and valuable on account of the large deposits of gold contained therein amounting in the aggregate to about the sum of $30,000.00. That the above-named defendants threaten to continue to sluice and extract the gold from said dumps and threaten to, and unless restrained by the order of this Court, will extract all the gold therefrom and will exclude the plaintiff from his just proportion thereof, to wit, the amount of 75 per cent thereof; and if the said defendants are not restrained by the order

of this Court, that they will wholly waste and destroy the entire value of said dumps and this plaintiff's estate and interest therein, and effect upon this plaintiff great injury and irreparable damage.

IX.

Plaintiff further alleges that he has no plain, speedy or adequate remedy at law.

X.

Plaintiff further alleges that the defendants and each of them are insolvent, being utterly without any property whatsoever, other than the gold that they have taken out from the premises owned by the plaintiff, or is now contained in the dumps set forth and described herein.

XI.

Plaintiff further alleges that he has performed all the conditions on his part to be performed contained in said lease.

Wherefore plaintiff prays:

1st. For the recovery of the possession of 75 per cent of the gross proceeds of gold already taken from said premises.

2d. That this Court issue an injunction against the said defendants and each of them restraining the said defendants, their attorneys, servants, employees, agents and all persons in privity with them, or either of them, from sluicing the aforesaid dumps or extracting the gold therefrom until the final hearing of this cause.

3d. That an accounting be had of the gold already extracted by the defendants, and that the said defendants be adjudged and decreed to deliver to this plaintiff 75 per cent of all gold so taken and extracted from said dumps by the said defendants or by any other persons or employees on their behalf.

4th. That the plaintiff be adjudged and decreed to be the owner of 75 per cent of all the gold which now is deposited in said dumps.

5th. Plaintiff prays that a receiver may be appointed by this Court to take charge of the dumps described in plaintiff's complaint and to protect the same during the pendency of this action, and to dispose of the same according to the judgment and decree of this Court.

6th. Plaintiff prays for general relief.

A. J. BRUNER,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says:

I am the plaintiff in the above-entitled action and have read the foregoing, my complaint, know the contents thereof, and the same is true, as I verily believe.

STANLEY KUZEK.

Subscribed in my presence and sworn to before me this 28th day of May, 1904.

[Notarial Seal] A. J. BRUNER,

Notary Public in and for the District of Alaska, Residing in said District.

[Endorsed]: No. 1122. In the United States District Court, District of Alaska, Second Division. Stanley Kuzek, plaintiff, vs. Chas. F. Magaha and Wm. Elliott, defendants. Complaint. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska, May 28, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff.

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*In the United States District Court, in and for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

**Summons.**

The President of the United States of America to Chas. F. Magaha and Wm. Elliott, Defendants, Greeting:

You and each of you are summoned and required to appear and answer the complaint of plaintiff as filed in the office of the clerk of said Court at the city of Nome

in said District within thirty days from the service of this summons upon you or judgment for want thereof will be taken against you. And you are further hereby notified that if you fail to answer the said complaint, the plaintiff will apply to the Court for the relief demanded therein.

Witness the Honorable ALFRED S. MOORE, Judge of the United States District Court, in and for the District of Alaska, Second Division, and the seal of said Court affixed this 28th day of May, A. D. 1904, and in the independence of the United States one hundred and twenty-eighth.

[Court Seal] GEO. V. BORCHSENIUS,
Clerk of the United States District Court, in and for the District of Alaska, Second Division.

By Jno. H. Dunn,
Deputy.

United States of America,
District of Alaska,
Second Division.

I hereby certify that I received the annexed summons on the 28th day of May, 1904; and thereafter, on the 29th day of May, 1904, I served the same, at the Marion Bench Claim on Peluck creek, Alaska, upon Chas. F. Magaha and Wm. Elliott, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 31st day of May, 1904.

FRANK H. RICHARDS,
United States Marshal.

By Geo. W. Comerford,
Deputy.

[Endorsed]: No. 1122. United States District Court of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Summons. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. May 31, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff.

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*In the United States District Court in and for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

## Answer.

Comes now the defendants in the above-entitled action and answering plaintiff's complaint, allege and deny as follows:

I.

Deny that on the 5th day of December, 1903, at Nome, Alaska, the plaintiff made his certain lease of the premises described in the complaint in the words and figures as set forth in paragraph II of plaintiff's complaint.

Further answering paragraph II, the defendants allege that on or about the 18th day of November, 1903, the plaintiff, Stanley Kuzek, agreed with the defendants orally to allow them to prospect a few days on the placer mining claim mentioned in plaintiff's complaint with a view of letting defendants have a lay on said premises. That after defendants had prospected a few days, and on or about the 20th of November, 1903, the plaintiff and defendants agreed that the defendants might continue working said property on a lay of 25 per cent to the owner and 75 per cent to the defendants. That thereafter and on or about the 11th day of December, 1903, defendants commenced working continuously on said claim with boiler and thawing apparatus under and in pursuance of said oral agreement; and thereafter continued to work, operate and mine said property and extract dirt therefrom, but without sluicing the same, until on or about the 4th day of March, 1904. That prior to the 4th day of March, 1904, there was no written contract or lease entered into between the plaintiff and defendants in relation to working, mining or operating said property. That on or about said 4th day of March, 1904, the plaintiff and defendants agreed to reduce said oral lay to writing the thereupon the defendant Elliott, using a blank form of lease, drew up a lay lease of said premises

substantially in words and figures as set forth in paragraph II of plaintiff's complaint save and except that said lay lease, so drawn up by the defendant Elliott, provided for the payment of 25 per cent of the gross output of said claim to plaintiff, Stanley Kuzek, lessor, instead of 75 per cent as stated in the alleged lease, set forth in paragraph II of plaintiff's complaint. That said lease so drawn up by defendant Elliott which provided for the payment of 25 per cent of the gross output of said claim to said Stanley Kuzek instead of 75 per cent was on said 4th day of March, 1904, actually signed by plaintiff and defendants and delivered to defendants, and is and was at all times herein mentioned the original lease entered into in writing between the parties hereto. That at the request of said plaintiff Stanley Kuzek, the said lease, was by the parties hereto dated back so as to appear to have been entered into and executed on the 5th day of December, 1903, although the same was never drawn up, signed, executed or delivered until said 4th day of March, 1904. That after said 4th day of March, 1904, continuously until the injunction was issued in the above-entitled action, said defendants have continued to work, mine and operate said mine and mining claim in said complaint described, under and pursuant to said original lease aforesaid.

That afterwards and on or about the 3d day of April, 1904, at the request of the said Stanley Kuzek, the said defendant Elliott drew up a duplicate or copy of said lease, to be retained by the plaintiff Kuzek; that in drawing up said duplicate or copy, defendant Elliott used the

same kind of a printed blank as was used by him for said original lease, but in copying and drawing the same he erroneously wrote in the words "75 per cent" to be paid to the lessor, instead of "25 per cent" which was written in said original lease. That said copy or duplicate of said lease so drawn up on said 3d day of April, 1904, in which said mistake was made as aforesaid was signed by the plaintiff and defendants and delivered to said Kuzek; and the defendants allege on their information and belief that said duplicate copy of said lease is the document set forth in paragraph II of plaintiff's complaint. That in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff. That the mistake made by plaintiff and defendants in copying and signing said lease was mutual, and was inadvertently made by the defendant Elliott in copying said original lease, and was not known to either the plaintiff or defendants until considerable time afterwards. That said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them, but by said mistake and inadvertence aforesaid, it was made to ap-

pear thereby that the plaintiff, lessor, was entitled to 75 per cent of the gross output of said claim, whereas and in fact the true mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent. That it was not intended by drawing up and signing and executing said copy or duplicate lease to change or modify in any particular the original lease in writing, entered into between the parties aforesaid.

Defendants further allege that said original lease so signed, entered into and executed by plaintiff and defendants on said 4th day of March, 1904, has been by the defendants inadvertently lost or mislaid, and for that reason they cannot produce the same. That said original lease was, however, in substance the same as the duplicate or copy thereof set forth in plaintiff's complaint, except that it provided for the payment to plaintiff, Kuzek, of 25 per cent instead of 75 per cent of the gross output of said claim.

That defendants have made long, careful and diligent search for said original lease, but are unable to find the same.

II.

Answering paragraph III of plaintiff's complaint defendants deny that under or pursuant to the provisions of the lease set forth in paragraph II of plaintiff's complaint, the defendants entered into the possession of the above-described premises on or about the 10th day of December, 1903, or at any other time.

Further answering paragraph III the defendants allege that they originally entered into the possession of said property under and in pursuance to the oral agreement heretofore alleged, and have ever since said time been in the possession of the same and working and mining and operating the same and have extracted therefrom large quantities of earth containing gold in large quantities, under and pursuant to said oral lease as originally entered into, and subsequently, pursuant to said original lease in writing entered into between the parties on or about the 4th day of March, 1904, as hereinbefore alleged.

III.

Answering paragraph V the defendants admit that on the 23d day of May, 1904, the above-named defendants, having made a clean-up of 54 8/100 ounces of gold from said claim described in plaintiff's complaint, in company with the plaintiff carried the same to the Alaska Banking and Safe Deposit Company's office in Nome for the purpose of having the same assayed and selling the same to said Bank and dividing the proceeds between the plaintiff and defendants.

Defendants further admit that since the 23d day of May, 1904, they have continued to sluice the dumps of pay gravel on said premises, and that on the 28th day of May, 1904, they brought into the town of Nome, in company with this plaintiff, a quantity of gold, the exact amount of which is unknown to defendants, but which they allege to be between 10 and 15 pounds.

The defendants deny that said quantity of gold is 35

pounds of gold but allege that they are unable to allege the exact quantity of the same, for the reason that the same has not been weighed.

Defendants deny that said golddust, taken out by them and brought to town, was of the value of about $8,825.00, and further allege that having never weighed the same, they have no knowledge or information sufficient to form a belief as to the exact value of the same, but allege the value to about $3,000.00 and no more.

IV.

Answering paragraph VI of plaintiff's complaint, defendants admit that on both occasions, to wit, the 24th day of May, and the 28th day of May, 1904, the plaintiff demanded that the defendants pay and deliver to him 75 per cent of the gross output of said claim; and defendants further admit that they refused to make such a division of the golddust with the plaintiff and refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust or the proceeds thereof.

Defendants deny that upon making further demand upon the 28th day of May, 1904, the defendants took all of said golddust from the plaintiff's possession by means of force or arms or have threatened to or will, unless restrained by order of Court, convert the entire proceeds thereof to their own use.

Further answering said paragraph VI, the defendants allege that the first lot of golddust cleaned up upon said premises, amounting to 54-8/100 ounces, has been de-

livered to and is now in the possession of the Alaska Banking and Safe Deposit Company in Nome, Alaska.

That on the 28th day of May, 1904, when the defendants refused to pay or deliver to said Kuzek more than 25 per cent of the last lot of golddust, amounting, as aforesaid, to about 10 or 15 pounds, the plaintiff, Kuzek, forcibly and unlawfully, grabbed the same out of the hands of defendant Magaha and the defendants, Magaha and Elliott, without any unnecessary force or violence, retook the same from the said Kuzek and now have the same in their possession.

V.

Answering paragraph VII of plaintiff's complaint, defendants deny that at the time therein mentioned, or at any time, the defendants sat on plaintiff or beat or wounded or knocked him down or refused to deliver any portion of said proceeds to plaintiff; and further answering said paragraph, defendants allege that they used no more force and violence toward the plaintiff, Stanley Kuzek, than was necessary to retake from his possession the said quantity of golddust which he had forcibly and unlawfully grabbed out of the hands of said defendant Magaha.

VI.

Answering paragraph VIII of plaintiff's complaint, defendants admit that the remaining dumps on said premises, described in plaintiff's complaint, are rich in value on account of the large deposits of gold contained therein, and admit that the defendants would have con-

tinued to sluice and extract the gold from said dumps had they not been restrained by order of Court; but the defendants deny that they would have excluded the plaintiff from his just portion thereof, and deny that if said defendants are not restrained by an order of this Court, that they will wholly waste or destroy, or waste or destroy at all the entire value of said dump, or the plaintiff's estate or interest therein, or will effect upon plaintiff great or irreparable or any injury or damage whatever.

VII.

Answering paragraph IX of plaintiff's complaint, defendants deny that the plaintiff has no plain, speedy or adequate remedy at law.

VIII.

Answering paragraph X of plaintiff's complaint, defendants deny that they or either of them are insolvent or that they are utterly without any property whatever other than the gold that they have taken out of the premises owned by plaintiff or contained in the dumps described in plaintiff's complaint.

IX.

Answering paragraph XI of plaintiff's complaint, defendants deny that the plaintiff has performed all the conditions on his part to be performed, as contained in the lease of said premises from plaintiff to defendants. Defendants further allege that they have at all times fully and faithfully performed all the covenants and

agreements of the lease of said premises by plaintiff to defendants.

X.

Further answering plaintiff's complaint, defendants allege that they have been at all times, and now are ready and willing to fully and faithfully perform each and every covenant of said original lease of the premises described in plaintiff's complaint so drawn up, signed, and executed on or about the 4th day of March, 1904, as hereinbefore set forth.

That by reason of the issuance of the injunction herein the defendants have been prevented from the 28th day of May, 1904, from sluicing up the dumps of pay dirt on said premises, and that unless said injunction be immediately dissolved, said defendants will not be able to sluice up and extract any gold therefrom until the opening of the summer season in the year 1905, except at great expense in pumping water. That by reason of having been enjoined from sluicing up said dumps since the 28th day of May, 1904, when the water from the melting snow runs, the defendants have been and still are prevented from taking any advantage of said snow water, and will be, unless said injunction is immediately dissolved, entirely prohibited from sluicing up said dumps, except at great expense, as aforesaid. That if no injunction had been issued herein, the defendants by means of the water from the melting snow, would have been able to completely sluice and clean up said dumps before the 5th day of June, 1904.

Wherefore the defendants pray:

1st. That the injunction heretofore issued herein be dissolved.

2d. That the Court, by its decree herein, correct said duplicate or copy of a lease between plaintiff and defendants, by changing the words "75 per cent" therein to "25 per cent," in so far as said duplicate or copy of said lease may in any way affect the rights of plaintiff and defendants.

3. That the Court adjudge and decree that the defendants are entitled to 75 per cent of the gross output of said dumps of pay gravel extracted by them from the premises described in plaintiff's complaint, and that the plaintiff is entitled to 25 per cent.

4. That the Court adjudged and decreed that the defendants be allowed to continue in possession of said premises and sluice and clean up said dumps of pay gravel, aforesaid, and retain therefrom 75 per cent of the gross amount of gold produced therefrom.

6th. That the defendants have judgment for their costs and disbursements herein and for all other relief, which they may be in equity entitled.

IRA D. ORTON,
Attorney for Defendants.

United States of America,
District of Alaska. } ss.

Charles F. Magaha and Wm. Elliott, being each first duly sworn, deposes and say:

That they are the defendants in the above-entitled action; that they have heard read the foregoing, their an-

swer, and know the contents thereof, and that the same is true as they verily believe.

CHAS. F. MAGAHA.
WM. ELLIOTT.

Subscribed in my presence and sworn to before me this 31st day of May, 1904.

[Notarial Seal] JAS. W. BELL,
Notary Public in and for the District of Alaska, Residing at Nome.

Received copy of the within answer this May 31st, 1904.

A. J. BRUNER,
Attorney for Plaintiff.

[Endorsed]: Original. No. 1122. In the United States District Court, for the District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Answer. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division at Nome, Alaska. Jun. 1, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. Ira D. Orton, Attorney for Defendants. Filed Jun. 1/04.

*In the United States District Court for the Second Division of the District of Alaska.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

**Amendment to Complaint.**

Now comes the plaintiff, and by leave of the Court first had and obtained, files this his amendment to the complaint on file herein:

Strike out the first four lines of paragraph two of the complaint, and insert in lieu thereof the following:

"That on or about the 5th day of December, 1903, at Nome, Alaska, the said plaintiff leased the above-described premises to the above-named defendants, and that thereafter and on or about the 9th day of March, 1904, the said lease was reduced to writing by the parties, and the said lease was and is in the words and figures as follows, to wit."

A. J. BRUNER,
ELWOOD BRUNER,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says: That he has read the amendment to the original complaint, and that the same is true as he verily believes; that the said Kuzek is the plaintiff in said action.

STANLEY KUZEK.

Subscribed and sworn to before me this 11th day of July, 1904.

[Notarial Seal] G. J. LOMEN,
Notary Public, Alaska.

[Endorsed]: 1122. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha et al., Defendants. Amendment to Original Complaint. Filed in the office of the clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. July 11, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, and Elwood Bruner, Plaintiff's Attorneys. Filed July 11, 1904.

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

**Reply.**

Comes now the above-named plaintiff, and replying to the new matter contained in defendants' answer, admits, denies and alleges as follows:

I.

Replying to paragraph 1 of said answer, plaintiff admits that he agreed with defendants orally to allow defendants to prospect a few days on the placer mining claim mentioned in plaintiff's complaint, with a view of letting defendants have a lay on said premises, providing they could agree upon the terms of said lay; and admits that afterwards the plaintiff agreed that the defendants might have a lay on said property, but denies that the defendants were to have a lay of 25 per cent to the owner and 75 per cent to the defendants, but alleges the fact to be that 75 per cent of the gross proceeds was to be delivered to plaintiff and the defendants were to retain 25 per cent thereof.

Plaintiff admits that on or about the 11th day of December, 1903, the defendants commenced working

said claim, and afterwards continued to work, operate and mine said property, but denies that it was in pursuance of the alleged oral agreement set forth in defendants' answer, but avers the fact to be that it was under the agreement set forth in plaintiff's complaint; admits that plaintiff and defendants agreed to reduce the oral lay to writing, and that thereupon, on or about the 9th day of March, 1904, the defendant Elliott, using a blank form of lease, drew up a lay lease of said premises in the words and figures set forth in paragraph 2 of plaintiff's complaint; but denies that said lease provided for the payment of 25 per cent of the gross output to plaintiff, lessor, instead of 75 per cent, but avers the fact to be that said lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff;

Admits that the lease as drawn up by defendant Elliott was, on or about the 9th day of March, 1904, actually signed by plaintiff and defendants, and delivered to defendants; but denies that said lease so signed provided for the payment of 25 per cent of the gross output of said claim to plaintiff, but avers the fact to be that said lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff; admits that afterwards, and on or about the 4th day of April, 1904, at the request of the plaintiff, said defendant Elliott drew up a duplicate or copy of said lease to be retained by the plaintiff, Kuzek, and that in drawing up said duplicate or copy of said lease, defendant Elliott used the same kind of a printed blank as was used by him for

said original lease; but denies that in copying or drawing up the same, defendant Elliott erroneously wrote in the words: "75 per cent to be paid to the lessor" instead of "25 per cent," but alleges the fact to be that said duplicate or copy was an exact copy of the original lease mentioned in plaintiff's complaint, and originally signed by the parties to this action; admits that in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties to this action, and admits that at the time the same was signed by the plaintiff and defendants that both the parties hereto believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into by the parties hereto, but denies that said original lease provided for the payment of 25 per cent of the gross output of said claim to plaintiff, but avers the fact to be that said original lease provided for the payment of 75 per cent of the gross output of said claim to the plaintiff; denies that any mistake was made either by plaintiff or defendants in copying or signing said lease, and avers the fact to be that there was never any discovery made by either the plaintiff or defendants, either a considerable time afterwards or at any time of any mistake having been made in copying said lease.

Plaintiff denies that "said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them," or denies "that any mistake or inad-

vertence was made by which it was made to appear that the plaintiff was entitled to 75 per cent of the gross output of said claim, but that in truth and in fact the mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent."

Admits that it was not intended by drawing up and signing and executing said copy or duplicate lease to change or to modify in any particular the original lease in writing entered into by the parties aforesaid, and avers the fact to be that said duplicate copy so written by said defendant Elliott was an exact duplicate and copy of the original lease signed by all the parties hereto on or about the 9th day of March, 1904.

The plaintiff denies that he has any knowledge or information thereof sufficient to form a belief, and therefore denies that said original lease signed by the parties hereto has been by the defendants, or either of them, inadvertently lost or mislaid, or that they cannot produce the same; admits that said original lease was an exact copy of the duplicate lease in plaintiff's possession, and denies that said original lease provided for the payment to plaintiff of 25 per cent, instead of 75 per cent, of the gross output of said claim, but on the contrary alleges the fact to be that said original lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff; denies that defendants have made long and careful or diligent search for said original lease, or that they are unable to find the same.

II.

Plaintiff replying to paragraph 2 of said defendant's answer, denies that the defendants entered into the possession of the said property under or in pursuance of the oral agreement set forth in defendant's answer; but that said defendants entered into possession of said premises and worked and mined the same under the provisions of, and in pursuance of the lease set forth in plaintiff's complaint.

III.

Replying to paragraph 3 of defendants' answer, plaintiff admits that on the 28th day of May, 1904, defendants brought into the town of Nome, in company with plaintiff, a quantity of gold; but denies that the exact amount of said gold is not known to said defendants, and denies that it was between 10 and 15 pounds of gold, but on the contrary avers the fact to be that there were about 35 pounds of gold; denies that said gold was only of the value of about $3,000; but alleges the fact to be that it was of about the value of $8,525.00.

IV.

Plaintiff replying to paragraph 4, denies that he, the said plaintiff, forcibly or unlawfully grabbed the same out of the hands of the defendant, Magaha, but alleges that both the plaintiff and defendant Magaha had hold of the poke containing said gold at the same time; admits that the defendants Magaha and Elliott retook the same from this plaintiff and the said Magaha, and now

have the same in their possession; but deny that they took the same without any force or violence, but on the contrary alleges that they used more force and violence than was necessary and hit and unnecessarily beat and wounded this plaintiff.

V.

Plaintiff, replying to paragraph 5 of defendants' answer, denies that they used no more force or violence toward the plaintiff than was necessary to retake from the said plaintiff the said quantity of golddust, and denies that he forcibly or unlawfully grabbed the same out of the hands of the said defendant Magaha, but allege the fact to be that he took hold of the said poke and was thereupon set upon and was beaten and wounded by said defendants.

VI.

Replying to paragraph 9 of defendants' answer, denies that defendants have at all times fully and faithfully performed all the covenants or agreements of the said lease of said premises by plaintiff to said defendants.

VII.

Replying to paragraph 10 of defendants' answer, plaintiff admits the issuance of the injunction and the prevention of the defendants from sluicing up the dumps, unless they would agree to the appointment of a receiver; plaintiff avers the fact to be that immediately after the issuance of the injunction he offered to stipulate that a receiver might be appointed by the Court at

small expense to the parties hereto, and that if said receiver had been appointed that said dumps upon said premises might have been fully sluiced up with the surface water now running with very small cost to the parties hereto; that said defendants refused to stipulate for the appointment of a receiver, and by so doing have themselves prevented the sluicing up of said dumps.

Wherefore, plaintiff having fully replied to defendants' answer, prays judgment as set forth in his complaint.

A. J. BRUNER,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says: I am the plaintiff above named; I have read the foregoing, my reply, and know the contents thereof; the same is true, as I verily believe.

STANLEY KUZEK.

Subscribed and sworn to before me this 3d day of June, 1904.

[Notarial Seal] J. F. HOBBES,
A Notary Public in and for the District of Alaska.

Service of the within by copy acknowledged this 4th day of June, A. D. 1904.

IRA D. ORTON,
Attorney for Defendants.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha et al., Defendants. Reply. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. June 4, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff

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*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

## Bill of Exceptions.

Be it remembered that on the 11th day of July, 1904, the above-entitled cause came on for trial before the Honorable Alfred S. Moore, without a jury; the plaintiff appearing by A. J. Bruner and Elwood Bruner, his counsel, and the defendants appearing by Ira D. Orton and John L. McGinn, their counsel, and the following proceedings were had and testimony taken:

Plaintiff then offered in evidence the report of the receiver heretofore appointed in this case, showing that

the property in controversy in this cause was 625.67 ounces of gold, and 366 86-100 dollars in money on deposit with the Alaska Banking and Safe Deposit Company of Nome, Alaska, subject to the final disposition of said cause.

Defendants offered no objection, and the report was admitted in evidence.

Mr. Elwood Bruner made a statement of the case, and the following proceedings were had:

I would ask you, Mr. Orton, if you have the paper I asked you for the other day, that is, what you say or claim to be the original lease.

Mr. ORTON.—It is explained in the answer very fully that that has been lost.

Mr. BRUNER.—I ask counsel to produce it if they have it now, and if they haven't to so state.

Mr. ORTON.—We haven't got it in court; there is no question about that.

Mr. BRUNER.—I ask you if you have it in your possession.

Mr. ORTON.—No, we haven't got it in our possession, or under our control, or never have had it.

Mr. Bruner then offered in evidence the duplicate lease set out in paragraph 2 of the complaint signed and executed on the 4th day of April, to which offer objection being made it was temporarily withdrawn.

And thereupon, BERTHA KUZEK, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

A paper was thereupon handed to the witness: "I am the Bertha Kuzek whose name is signed to this paper as a witness; that is my signature as a witness; I know the signatures of the parties to the instrument and saw them sign the paper."

Plaintiff then offered in evidence the duplicate lease set out in the complaint, and objection being made thereto by defendants' counsel, the plaintiff thereupon, by his counsel, asked leave of the Court to amend the complaint as follows:

"Strike out the first four lines of paragraph 2 of the complaint, and insert in lieu thereof the following: 'That on or about the 5th day of December, 1903, at Nome, Alaska, the said plaintiff leased the above-described premises to the above-named defendants, and that thereafter, and on or about the 9th day of March, 1904, the said lease was reduced to writing by the parties, and the said lease was and is in the words and figures, to wit:' "

Mr. McGINN.—We object to the proposed amendment of plaintiff to their complaint on the ground—

1st. That the allegations are too general, and on the further ground that it is a complete change of the issues that are set forth in the original complaint, and

(Testimony of Mrs. Bertha Kuzek.)

is at variance with the relief that was sought to be obtained in the original complaint, and the further reason that the amended complaint fails to state what the agreements were that were entered into on the 5th day of December, 1903.

The COURT.—We overrule the objection and permit the amendment.

Mr. ORTON.—We ask an opportunity to file an answer to it. "We admit, of course, that on or about the 5th of December, 1903, the plaintiff did lease the premises to the defendants, and also that thereafter and on or about the 4th day of March, the lease was reduced to writing; but, of course, we will deny that it was in words and figures as set forth in the complaint."

Permission to file an answer to the amendment was granted by the Court, without objection.

And thereupon, the Court overruled defendants' objection, and the duplicate lease offered by plaintiff was admitted in evidence, and marked Plaintiff's Exhibit No. 2, which was and is in the words and figures following:

## Plaintiff's Exhibit No. 2.

### MINING CLAIM LEASE.

This indenture, made and entered into this fifth day of December, A. D. 1903, by and between Stanley Kuzek, of Nome, District of Alaska, party of the first part, hereinafter called the lessor, and Chas. F. Magaha and Wm.

(Testimony of Mrs. Bertha Kuzek.)

Elliott, of Nome, District of Alaska, party of the second part, hereinafter called the lessee, witnesseth:

That the said lessor, for and in consideration of the royalties to be paid and the covenants to be performed by the said lessee, as hereinafter stated, hereby lease, demise, and let unto the said lessee, Magaha & Elliott, that certain placer mining claim and ground situated in the Cape Nome Recording District, District of Alaska, and known as Marion Bench Claim on Right Limit of Peluk creek, located by J. P. Currie on the 12th day of July, A. D. 1899, recorded on the 10th day of August, A. D. 1899, at page 87, volume XVI, in the office and records of the Recorder of the Nome Recording District.

Together with all the rights and privileges of entering upon and over the said property and to prospect the same for gold and the precious minerals in whatever deposits the same may be found, and to mine and extract the same.

To have and to hold, unto the said lessee, for the period of ——— from date hereof or until noon of the fifth day of June, A. D. 1904, unless sooner terminated by forfeiture or mutual agreement. In consideration of such lease and privileges the said lessee covenant and agree with and to said lessor as follows:

First.—To enter upon said mining claim and premises on or before the 19th day of December, A. D. 1903, and to at once begin to prospect and exploit the same for the purpose of discovering thereon placer deposits

(Testimony of Mrs. Bertha Kuzek.)

of gold or other valuable minerals, and to continue such work with due diligence as long as the weather and circumstances in the community will permit.

Second.—To work and mine the said premises as aforesaid steadily and continuously from the date of such entry, with at most eight men employed thereon continuously, working at least eight during the months of working seasons.

Third.—To work said mining claim and premises hereby leased in the most practical manner known to good mining in said district, and to such extent as to develop said property and to produce therefrom the greatest value in ores and minerals.

Fourth.—To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904, with privileges to sluice what dumps they have left, and that the lessor may have due and sufficient notice of all cleanups and be present in person or by his legal representatives at each and every cleanup.

Fifth..—To deliver the said premises, with the appurtenances and all improvements, except machinery placed thereon, to the said lessor in good order and condition at the expiration of this lease.

The right is reserved by the said lessor, to enter upon and over said property at all reasonable times for the purpose of inspection and for the purpose of obtaining access to and from any other property owned or operated by the said lessor.

(Testimony of Mrs. Bertha Kuzek.)

This lease and the privileges hereby granted shall not be assignable except with the consent of the said lessor, and in the event of a sale of the above-described property this lease shall at once cease and determine upon the payment by the said lessor to the said lessee ——— per cent of the sale price of said property.

In witness whereof, we have hereunto set our hands and seals this fifth day of December, A. D. 1904.

STANLEY KUZEK.
CHAS. F. MAGAHA.
WM. ELLIOTT.
Party Second Part.

Signed, sealed and delivered in the presence of:
Mrs. BERTHA KUZEK.

And thereupon plaintiff rested his case.

Mr. McGINN.—We move that the plaintiff be not sustained, for the reason that the plaintiff has failed to establish the allegations set forth in their complaint, in this: That they have failed to establish the terms of the agreement that was entered into by these persons on the 5th day of December, 1903, and for the further reason that they have failed to show that the defendants in this action entered into possession of this property under the terms of the agreement, that they have introduced in evidence here, or that they entered into possession of said property under the agreement made on the

5th day of December, 1903, as that allegation has not been changed in any particular; and the only evidence is that there was an agreement signed by the parties on the 4th day of April, 1903, and that that was a duplicate or copy, of the agreement that was made out on the 4th day of March, 1903; and there is nothing to show in this case that the defendants entered on the ground under and in pursuance of the terms of this agreement introduced here, and it appears to me that the evidence is wholly insufficient."

After argument the Court overruled the motion made on behalf of the defendants.

And thereupon WILLIAM ELLIOTT, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I am one of the defendants in this case; I have known Mr. and Mrs. Kuzek since June, 1903; I am acquainted with the Marion Bench claim, the same claim mentioned in plaintiff's complaint, situated on Peluk creek; I am the same William Elliott that signed the duplicate lease known as Plaintiff's Exhibit No. 2; it was also signed by Charles Magaha, my codefendant; it was written out and signed by me on the 4th of April, as near as I can guess—that is, I am not sure of the date; as near as I think; it was signed the 5th by Charley, my partner, the next morning; another paper similar in form to that and upon the same subject matter was signed by the same parties about a month prior to this one. Both the orig-

(Testimony of William Elliott.)

inal, which was written on the 4th of March, and the duplicate, which was written on the 4th day of April, are entirely in my handwriting.

It was thereupon agreed by counsel and the Court that each and every ruling of the Court during the trial of the case should be deemed duly excepted to.

Q. In reference to this original lease so called the first one that was signed, what was done with it after it was signed?

Mr. BRUNER.—We object to the question on the ground that it is irrelevant, immaterial and incompetent.

The COURT.—The objection is overruled.

A. I brought it up to town and turned it over to Mr. Taylor, of the Beau Mercantile Company.

Mr. BRUNER.—I move to strike the answer out as irrelevant and incompetent.

Mr. ORTON.—I am proving the loss.

The COURT.—Objection overruled.

A. I turned it over to Mr. Taylor inside of two or three hours after it was signed; it was the same identical lease that was signed about the 4th of March, by myself, Magaha and Kuzek.

Q. What did Mr. Taylor do with the lease, if anything while you were there?

Mr. ELWOOD BRUNER.—I object to the question as immaterial, irrelevant and incompetent, for the reason that he must come to the last time the lease was seen.

(Testimony of William Elliott.)

The COURT.—You don't need to follow it through all the successive hands.

Mr. ORTON.—I propose to produce the witnesses here; I want to identify the instrument as being the same identical lease; I propose to produce Mr. Taylor here, and I want to show why this man left it there, and that Mr. Taylor read it.

Mr. BRUNER.—That is not the intention of this evidence; it is to show the loss of the instrument.

Mr. ORTON.—I propose to show the loss; I can put in my evidence in different parts, or all together.

Mr. BRUNER.—I don't think that that is the orderly way. That would require an absolutely different argument when it comes to what Mr. Taylor or anybody else did; the only question before the Court is, to prove the loss of the instrument; that is what we have been arguing this morning.

The COURT.—I suppose you wish to show that it passed through Mr. Taylor's hands, and he had a chance to examine it?

Mr. ORTON.—I expect to, and he did examine it.

The COURT.—The objection is overruled.

A. He examined it. Mr. Taylor then took it to Mr. Cowden, and I went with him.

Q. What did Mr. Cowden do with it?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent, what Mr. Cowden may have done with it.)

(Testimony of William Elliott.)

The COURT.—We will have to allow him to take his own course in putting in this evidence.

A. He examined it. I took it from Mr. Cowden and returned it to Mr. Taylor, who had it three or four days; I next saw it on the 9th of March when we drew the mortgage up. Mr. Taylor took it out of the safe, and it was left with Judge Reed, after the mortgage was drawn up; possibly 4 or 5 o'clock in the afternoon, I took it over to the Hub or to the Hunter Saloon, and Mr. Magaha got it out of my pocket; I saw it next on the 1st day of April, when I got it from Mr. English. It was the same identical paper that was signed on or about the 4th day of March. On the 1st of April, I took it down to the claim, and put it in a box we had to put papers in; it remained there possibly four or five days, when I took it to draw up the duplicate which is now before me. After the duplicate was drawn up I put the original lease in the box again, where it remained until the 7th or 8th of April, when I turned it over to my partner, Magaha, since which time I have never seen it. Since then I have searched for it in Magaha's cabin here, and at the house on the claim; I have made inquiry since, but have never heard of it. Mr. Magaha put it in his inside pocket, and left for Nome; I have never seen it since.

The witness Elliott was then cross-examined by plaintiff's counsel, it being understood that the defendant's counsel should have the privilege of recalling him for further direct examination.

(Testimony of William Elliott.)

Cross-examination.

When I gave the original lease to Mr. Magaha, I did not come to town with him; I gave the paper to him for safekeeping, to put it on record or to put in safety; it was three or four days after we executed the duplicate, when I gave it to him in our house on the Marion Bench claim, and I said: "Take that and see that it is put away, or put on record." It is my best recollection that I told him to put it on record; about the 12th or 14th of April, I came up to town, and Magaha told me that he had lost it; and didn't know where; I told him to stay and look for it; he stayed five or six days, or thereabouts; I didn't ask him if he had placed it on record then; I asked him that afterwards; he said that he didn't know whether he had lost it or mislaid it; he said the last time he saw it was when he put it in his pocket down at the claim.

CHARLES F. MAGAHA, a witness produced on behalf of the defendants, testified as follows:

Direct Examination.

I am one of the defendants; I recognize the paper shown me known as Plaintiff's Exhibit No. 2; I signed it one morning about the 4th of April; I was working nights at that time. There was another paper of similar import to this which was signed by me, and the same parties about the 4th of March; we had it in a box in the cabin on the Marion Bench Claim until about the 7th or 8th of April, when Mr. Elliott handed the paper to me,

(Testimony of Charles F. Magaha.)

and I put it in my pocket; I put it in the outside pocket of an old canvas coat, and started for Nome; it is a mystery to me where it went to; I came to town and stopped in town five or six hours going around from one place to another, and I missed the paper; it was gone; it was several hours after I left the claim before I missed it; I have made search and inquiry for it; and have not seen the paper since; I went around to the different houses that I visited that night, saloons, I inquired in around in them if they had seen it, also the next morning I went down as far as the Standard Oil Company, and I met different people along the street, and asked them if they had seen the paper or picked it up, or saw anybody else pick it up, or anything up, and they told me no. I made search in my cabin in town, and went through all my papers there although I was positive I had never been in the cabin at all until I missed the paper. I also searched through the cabin and around the boiler shed on the claim; also around the dumps; I have looked for the paper where ever I believed there was a possibility of the paper being, and have not been able to find it, or get any trace of it; I have never seen it since the day it was handed to me by Mr. Elliott; do not know where it is now; do not know anybody that does, and have never heard anything of it in any way since that time.

(Testimony of Charles F. Magaha.)

Cross-examination.

I was dressed, ready to come to town, when Mr. Elliott handed the paper to me; after it was handed to me by Mr. Elliott, and I put it in my pocket, I never saw it again; I am sure it was in my pocket when I started for town; several hours afterwards, during the evening, I discovered its loss, and started immediately to find it; my purpose in bringing it to town was to put in Mr. Bob English's residence, but I lost it before I got that far; I had no other business to transact in town. When Mr. Elliott handed me the paper the afternoon I lost it, he said, "Better take this to town; there is a whole lot of trouble going on here; you don't know but what it might be lost." I did not see it on the 23d day of May; the first time I talked with an attorney was about the 28th of May; I do not know whether Mr. Elliott had consulted with an attorney prior to the 28th of May.

Leave was given to recall Mr. Magaha.

WILLIAM ELLIOTT, recalled on behalf of the defendants, testified as follows: I made the written portions of the duplicate on the 4th or 8th day of April; I had the original there; I don't know as I copied it; I laid the paper beside the other one; I thought I knew it well enough to make it out.

Q. (By Mr. ORTON.) I will ask you to examine this paper, particularly with reference to paragraph IV, where it states "To pay to said lessor or his legal rep-

(Testimony of William Elliott.)

resentatives or assigns 75 per cent of the gross output of said claim during," etc. I will ask you whether or not in making the copy you hold in your hand, you correctly copied the other paper.

Mr. ELWOOD BRUNER.—Objected to as immaterial, irrelevant and incompetent, and not the best evidence, the original being here in court.

Mr. ORTON.—I will call your Honor's attention to the fact that it is admitted in the pleadings that it was the intention of both parties to make an exact copy of the original.

Mr. BRUNER.—We allege that it is an exact copy of it.

Mr. ORTON.—That was the intention we are coming down to whether or not there was a mistake made in fact.

The COURT.—The objection overruled.

Mr. BRUNER.—The further objection to it that it is leading.

The COURT.—Objection overruled.

A. I didn't copy this the same as the other one; no, there was a mistake here.

Q. State wherein the mistake was made?

A. Instead of 75 it was 25.

Q. Do you know how you happened to make that mistake?

A. It was an oversight; the only way I can think;

(Testimony of William Elliott.)

where it says "with privileges to sluice what dumps they have left," where it says, "the year ending June 5th, 1904," that was down here in this lower line, next to the lower line right there; there was a vacancy in there of one or two lines that came down here—that was made out this clause—I remember the other one well.

The original paper was upon the same kind of a blank as this one; I made this duplicate paper because I had promised to make one out the next day after making the original; I was never personally acquainted with Mr. Kuzek, until after I went to work there.

Q. When did you first go to work there?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose.

The COURT.—Objection overruled.

A. I went there the latter part of November, 1903, to work.

Q. State whether at that time you had a lay on the Marion Bench Claim?

Mr. BRUNER.—Objected to as irrelevant and incompetent, the circumstances under which the agreement was entered into are admitted by both parties and as to what the original instrument contained is the only question before this Court.

The COURT.—They have recited in their pleadings that they had dealings in November, and entered upon this property to operate it to a certain extent.

(Testimony of William Elliott.)

Mr. BRUNER.—What difference would that make provided their agreement was reduced to writing? The only question as I understand it is, whether or not there was a mistake in the original writing or in this duplicate.

The COURT.—You allege, I believe, in your pleadings, that the agreement which was put in writing on March 4th was in effect, the oral agreement which was entered into in November, you are going back to November, what is the purpose of that?

Mr. ORTON.—That is merely preliminary to show what the character of this ground was. For the purpose of showing that it was a mutual mistake, I want to show that at all times after Mr. Elliott commenced to prospect this property it was orally understood between them that Kuzek was to have 25 per cent and they worked there under that understanding during that entire period, and that about the 4th of March this oral agreement was reduced to writing.

The COURT.—How will that throw any light on the question, as to whether there was a mistake in the copy made April 4th?

Mr. ORTON.—Not that particular point. What we insist on is we are showing what the other original agreement was that he entered into on the 4th day of March; then it would follow as a natural consequence that Mr. Elliott must have made a mistake.

The COURT.—I don't think that is the way. I think you must show it by people that have seen the original

(Testimony of William Elliott.)

evidence, that is the best evidence; the only way you can prove the contents of that original agreement is by the testimony of witnesses who have seen it, or perhaps by admissions.

Mr. ORTON.—It is perfectly proper for me to show what kind of ground this is, the nature of the claim and what we are having this controversy over.

The COURT.—I am not so sure about that.

Mr. ORTON.—I wish to prove by this witness the kind and character of this property, that it is a mining claim, and the character of it in a general way, what kind of a claim it is, and whether any pay had been discovered on it.

The COURT.—I understand the tendency of this testimony, which is indicated by this question, that you want to prove that it is likely that the agreement is as you contend it was, and contained 25 per cent royalty, instead of 75.

Mr. ORTON.—Yes, that is one way to put it.

The COURT.—I don't think that is the way to prove the contents.

Mr. ORTON.—I didn't have any idea that I could prove the contents but it is a circumstance—I propose to prove that by witnesses that saw the paper and I also wish to introduce additional evidence to show that these men's witnesses are telling the truth about it.

The COURT.—As I understand it, you propose to call

(Testimony of William Elliott.)

witnesses here to testify as to having seen this original agreement, and thereby to show its contents. Then you want to go a step farther and to show that it must be correct, their recollections, because the agreement is a reasonable one. We will close this whole matter just now and at this time we will require you to offer your direct evidence as to the mistake, and as to the circumstances offered we will defer that for a later consideration.

Mr. ORTON.—It is understood that we will have a further opportunity to offer it?

The COURT.—I will give you a chance later on, if the rules of law will permit you to offer the circumstances by way of showing the reasonableness of the agreement, for which you contend then it can be admitted.

Mr. BRUNER.—Then at this time I submit to the counsel for the defendants a draft of this agreement, made the day when the original agreement was executed. I state to the counsel for the other side and having shown them a paper which is better evidence that the evidence which they have sought to introduce as to what the original document contained; it is my understanding it is the duty of the Court to require the best evidence.

The COURT.—Maybe they do not wish to avail themselves of it.

Q. Mr. Elliott, referring to that original agreement, from which you state you copied the one that is here in

(Testimony of William Elliott.)

court, will you please state to the Court how many different persons and what their names are you ever showed that original paper to?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and for the further reason that it is not the best evidence, because it appears to the Court that there is better evidence within the possession or reach of the attorneys for the defendants, to wit, the abstract of the contract which was made on the same day the original was executed.

The COURT.—You can make what use you see fit of that paper you refer to. The objection is overruled.

A. Yes. I first showed that to Mr. Taylor and Mr. Cowden along about 3 o'clock in the afternoon of the day I drew it up; I next showed it to Judge Reed; he examined and drew a mortgage up from it; I also showed it to Fred Strelke and Mr. Cowden, cashier or manager of the Alaska Banking and Safe Deposit Company; he kept it three or four minutes, long enough to see the columns, items and different things. Judge Reed had it in my presence on the table when he drew up the mortgage; and every once in a while he would look at it, and have to read something in it; I was standing right over him. On another occasion I showed it to Mr. Strehlke. Mr. Strehlke had the paper in his hand possibly 5 minutes; he just read it over; he asked to see it and I handed it to him for the benefit of the boys who were working; he was looking up and down it; that was about the time

(Testimony of William Elliott.)

I drew up the duplicate on the 3d or 4th of April; the paper which I exhibited to Mr. Taylor, Judge Reed, Fred Strehlke and Mr. Cowden was the same paper which has been referred to as the original paper executed on the 4th of March and was signed by myself, Mr. Magaha and Mr. Kuzek and Mrs. Kuzek as a witness.

Cross-examination.

By Mr. A. J. BRUNER.—I made this duplicate on the 4th day of April, there were present myself, and Mr. and Mrs. Kuzek, in their house; I was seated at an ordinary eating-table near to the two windows; I do not know where they were sitting at the time; I took about five or ten minutes in copying this duplicate; I was in a hurry, I didn't want to make a copy that night, and I told him so; I had the original on the table at the time; I couldn't say that I looked at it; I thought I was familiar enough to write it up; I wouldn't say whether I examined it or not; I certainly did care whether or not the duplicate was an exact copy; I certainly know that I wrote that out that evening.

(Witness was here handed a draft of a lease claimed to have been made on the same day the original lease was executed.)

Q. At that time did you have this paper, did you see this paper there at that time?

A. No, that one was never produced at that time.

Q. I will ask you to look that over.

(Testimony of William Elliott.)

A. I remember when that—this was with the first one.

Q. Who wrote that?

A. I wrote the lower part.

Q. Who wrote this here?

A. I don't know where you mean.

Q. This writing here where it says, "Pay to said lessor"—

A. Let me look at that just a minute please.

Q. Yes, sir. (Hands witness paper.) Plaintiff's Exhibit No. 3.

A. There is two figures here I never wrote.

Q. What are they?

A. The "75" and this here "H-e-s."

Q. You never wrote that?

A. I will testify I never wrote that, that is not my figures.

Q. You are absolutely positive of that?

A. I am positive that is not my figures.

The witness further testified: "This paper was not on the table the day I made the last copy; as near as I can recollect, I was the first to sign the duplicate; I couldn't tell you whether Mr. or Mrs. Kuzek signed next; I know they did sign it in my presence at that time; she was a witness; I don't know whether she waited until after he signed it or not; I couldn't say whether she signed as a witness or not; I know she put her name down; I signed it as I made it out and handed it over to him to examine; he didn't read it aloud; I don't know if he exam-

(Testimony of William Elliott.)

ined it; Mrs. Kuzek did not read it aloud; it is not a fact that I held one paper in my hand and Mr. Kuzek held another and Mrs. Kuzek held the pencil memorandum in her hand at that time."

Q. Is that original draft in the same words as the original was in or not?

A. I could not tell you that; I didn't pay any attention to that one at all, when I wrote it up I started it lead pencil and threw it to one side.

Q. Was the duplicate in the same words that the original was in except the word "75," the figures "75"?

A. Well, I could not say that hardly; there might be a difference; it was a mistake in putting down 75 per cent to the lessor, I always thought so.

Q. What do you mean by putting down?

A. I mean putting it down to him, to Mr. Kuzek, instead of 25.

Q. Everything else is exactly the same, to the best of your recollection?

A. Let me look at that again.

Q. I am asking for your independent recollection. I am asking whether or not he recollects at this time that the duplicate was an exact copy of the original, save and except the figures "75"?

A. As near as I can recollect, it is, excepting the line that I called your attention to a few minutes ago.

Q. Did you know at the time that it was incorrectly drawn in the duplicate?

(Testimony of William Elliott.)

Mr. ORTON.—Objected to, the witness has never stated that it was incorrectly drawn, he says the word was not written on the same paper.

Q. Is that what you intended to say?

A. Yes, sir.

Q. Then the words are the same and the only difference then is in the dropping of the word one line, is that correct?

A. One or two, or one and a half, possibly, I don't know just what, and 75 instead of 25.

Q. With that exception, in your opinion, it is an exact copy?

A. As far as I can recollect, it is, and still there may be a word there that was not written at all.

Q. It was your intention to make an exact copy, was it not?

A. Of the original, yes, sir, what I claim to be the original, the first one I drew up.

Q. I want to ask you again, although you have already answered, did you or did you not use the original at the time you made this duplicate?

A. I used the original, I took it there to their house for that purpose, but in regards to reading it or using it, I can't swear I did, I thought I was familiar with it.

Q. You don't know whether it was used at all.

A. I may have referred to it, I might have, although I knew the dates.

Q. I am asking you the question, whether or not you used the original to your best recollection?

(Testimony of William Elliott.)

A. I tell you the original laid there for that purpose.

Q. That is not an answer to my question.

A. I don't know whether I used it or not.

Q. What is your best recollection about it?

A. That is it.

Q. Your best recollection then is that you did or did not? A. I am not positive.

Q. Which way do you think it was?

A. I am not positive, to the best of my recollection I don't know which way it was, whether I used it or not.

Q. You may or may not? A. Yes.

Q. You were asked for a duplicate?

A. Yes, sir.

Q. You drew this up for them to sign as a duplicate?

A. I did.

Q. You didn't care whether it was an exact copy or not? A. I certainly did.

Q. You didn't compare it with the original?

A. I made a thousand mistakes in my time where I suffered afterwards.

Q. Did you do it?

A. I can't say as to that.

Q. Then you might have compared it; then it might have been compared?

A. It might or might not, that is, in comparing the two I might have used it or might not.

The witness further testified: "Mr. and Mrs. Kuzek did not compare it; I made out their copy and threw it over to them; they certainly picked theirs up; it's im-

(Testimony of William Elliott.)

possible that Mr. Kuzek took up the duplicate and read it and then passed it over to Mrs. Kuzek and then Mr. Kuzek took the original and read it out loud; I would certainly have heard it, if they had done so; I left the duplicate with them and put the original in my pocket and took it over to my house."

Counsel here offered in evidence the pencil draft made on the same day the original was executed. It was admitted in evidence and marked "Plaintiff's Exhibit No. 3," and upon request of counsel for defendants, the Court directed the clerk to have it photographed.

Q. Will you be kind enough to read aloud the words that are written by you in that draft?

A. "Charles Magaha and William Elliott, Nome," and "Y" to this party, "Magaha and Elliott, November A. D." and figure "3," "15" and "Mo," and "8 men," this "2," "the year ending June the 5, 1904, also give them the right to sluice what pay dirt they have in dumps until finished," I am not sure about that "right," I could swear to that, almost, I couldn't say as to that; "then to sluice what pay-dirt they have in dumps until finished," and "His"; that is all; I couldn't state who wrote the words written in ink; that was on the paper before I saw it; when we came to draw up the written agreement, Kuzey said, "I have started one in December, or the 5th of December, we can draw from this; nothing was said about getting an attorney; Mr. Kuzek did not ask to come up town to get an attorney; when I was drawing up the

(Testimony of William Elliott.)

original, I used that draft in the start as a form to go by, as to how we should draw it; neither one knew how to draw it; I used that paper to start the original, to kind of have an idea how this ought to be drawn up; there were present only Magaha, myself and Mr. and Mrs. Kuzek; I could not say who signed first; I couldn't say whether the original instrument was read over at that time; there was some reading done before it was all wrote; I couldn't recollect whether it was read over two or three times or not; I know about what took place, I am satisfied in my own mind that it was not read over. I know that it was handed around to see if it was all right, I had to take it to town and get there by 2 o'clock, and it was after 2 o'clock, or close to 2 o'clock, before I started; Mr. Kuzek did not ask for a duplicate; I told him I will make another one out to-morrow when I come down," he says all right; on April the 4th he seemed to be pretty insistent to get the duplicate; on that night right after supper he wanted it signed; I told him I would fix it up to-morrow; that I preferred to fix it the next day; and he said he wanted it right then; and I said "all right, I will do the best I can at it."

A paper was here handed to the witness, marked Plaintiff's Exhibit No. 2, and he testified concerning it that he wrote all of the written part of said exhibit except the three signatures, Bertha Kuzek, Stanley Kuzek and Charles F. Magaha.

Q. It says here "To pay to said lessor or his legal representatives or assigns 75 per cent"?

(Testimony of William Elliott.)

A. I see that.

Q. It says to pay to "his" legal representatives or assigns 75? A. I see.

Q. You understand the meaning of the word "lessor"?

A. I don't know as I may have then, I certainly know it now.

Q. Did you at that time?

A. I think I did, yes.

Q. You have been a mining man?

A. I have been a mining man around where they never use anything of that kind.

Q. You didn't have to have occasion to use it to know what that means? A. I know what it means.

Q. You knew what it meant at the time, did you?

A. I did, yes, sir.

Q. And when you put in the 75 per cent in there, you knew that you were giving it to the lessor, didn't you?

A. Seventy-five; that was my mistake.

Q. You knew that you were giving it to the lessor?

A. I didn't know I was giving him 75 per cent.

Q. You were giving to the lessor or "his" not "their" legal representatives? A. I understand that.

Q. You didn't know that you were giving the lessor 75 per cent?

A. I might have been thinking of something else when I was writing.

Q. You might have been careless?

A. I might have been so.

(Testimony of William Elliott.)

Q. You think you were careless, don't you, when you wrote that? A. I know I was.

Q. You know you was?

Redirect Examination by Mr. ORTON.

Plaintiff's Exhibit No. 3, being shown to the witness, he testified as follows: When I first saw this paper this ink writing was written on it. Mr. Kuzek produced it. After Mr. Kuzek produced this paper I done no writing here (indicating). I wrote: "Charles F. Magaha and William Elliott, of Nome"; I wrote the "y" here to party, then "Magaha and Elliott." The figures "1903" just before the word "year" is not my writing. That figure "4" I would not swear to that, but I think it is my writing. Coming to paragraph "First" where it reads in printing, "First," etc., I don't think I wrote the word "November," I wouldn't say for sure. It isn't my "N." I wrote the word "15." The words "most 8" looks like mine. The word "her" just before "legal representatives" is not mine, I never make an "h" like that. I did not write the word just before the word "legal," nor the figures "75" after the word "assigns."

Q. After the word "during," the balance of the pencil writing before the words "and that the lessor" did you write that? A. I did; yes, sir.

Q. The word "his" before "legal representatives" in the last line of paragraph IV, did you write that?

A. It is mine, that is my writing, I always make an "h" like that, in all my writing, I always write it that

(Testimony of William Elliott.)

way; I never start at the bottom, you never find any word wherever I use "h" in it where I got it in the other way, I never start it that way unless there are two words together where I would have to run up.

Q. Now, I will ask you to state, Mr. Elliott, whether or not the word "h-e-s" or "h-e-r," or whatever that is before—in the fourth paragraph of this socalled draft of the lease, Plaintiff's Exhibit No. 3, the word in pencil writing, immediately before the words "legal representatives or assigns" was written on the paper that day? A. It was not written in my presence.

Q. Was the word or figures "75" after the word "assigns" in the same paragraph written that day?

A. They were not placed on that by me, and I never saw them there.

Recross-Examination by Mr. BRUNER.

Q. Since this morning, you have changed your mind in regard to what words you wrote in this, haven't you, Mr. Elliott?

A. After looking it carefully over there I say I never wrote that (pointing). I have changed my mind to say that it is not my writing.

Q. This morning you testified that you wrote all the pencil writing here, excepting the words "his" and "75," didn't you?

A. I don't think I said anything about "1903" there.

Q. Did you say you wrote that "1903" where it reads, "for the period of 1903, year from date"?

(Testimony of William Elliott.)

A. I didn't write that; no.

Q. Did you write the word "4" in 1904 before "unless sooner terminated"?

A. I couldn't swear to that, but I don't think I did, my figures have all got a different slant from that.

Q. Please write the figure "1903."

(Witness handed paper and pencil.)

Q. Please write your name.

A. Write my name?

Q. Please write "his." A. H-i-s.

Q. Now write "175." A. 175.

Q. Now, write "1903." (Witness writes as requested.)

The COURT.—If it suits your purpose, will you just run the pencil around it.

Q. I have had him write his name, so there will be no question about it; just run the pencil around it.

A. That way?

Mr. A. J. BRUNER.—We ask that this be introduced in evidence. Have you any objections?

Mr. ORTON.—None whatever.

The COURT.—It is admitted.

(Marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. ORTON.) Have you seen this paper which is identified as Plaintiff's Exhibit No. 3 since you left court this morning? A. No, sir; I have not.

CHARLES F. MAGAHA, called on behalf of defendants. The witness was handed Plaintiff's Exhibit No. 2, the duplicate, when he was asked the following questions:

Q. I call your attention to paragraph marked 4, which reads: "To pay to the said lessor his legal representatives or assigns 75 per cent of the gross output of said claim," etc., and I ask you to state if you can, what was the wording of the original lease in that paragraph.

Mr. BRUNER.—Objected to the question as irrelevant, immaterial and incompetent, and not the best evidence.

The COURT.—The objection overruled.

A. Well, to my best remembrance, it read, 25 per cent to the owner, and 75 per cent to Mr. Elliott and myself. I can't say whether the words "75" in the original lease was in writing or figures or both, but the figures were there, 25; but I couldn't swear that the writing and figures both were there; I signed the duplicate in the morning at the breakfast table at Mr. Kuzek's residence on Marion Bench; Elliott; Mrs. Kuzek and Kuzek had already signed it; I think Mr. and Mrs. Kuzek were both there at the time.

Cross-examination.

When I signed the duplicate, there was only one paper present at the time; I didn't read it over; they shoved it up to me and I signed it; Billy told me in

(Testimony of Charles F. Magaha.)

the morning that it was all right; all I had got to do was to sign it, it was made out the night before.

Q. You relied entirely upon the statements of your partner as to the terms of this lease.

A. I did, if I hadn't I should have read it over, but I didn't read it over.

Q. There were no representations to you by Mr. and Mrs. Kuzek in regard as to whether it was a true copy or not?

Mr. ORTON.—Objected to as immaterial, irrelevant and incompetent.

Mr. A. J. BRUNER.—We are trying to find out what took place.

The COURT.—Objection overruled.

A. No, sir. I am positive that I didn't read the paper over at all before signing it; I made no comparison between the duplicate and the original; the original was not there at the time; nor was the pencil copy there; I did not read the duplicate aloud, nor did Mr. or Mrs. Kuzek read the paper aloud, at that time; there was no comparison made between that paper and the pencil memorandum; I am almost positive I signed the duplicate at the breakfast table, and not in the sleeping-room adjoining it; I did not have the original paper in their house at that time; I made no comparison whatever, nor did Mr. or Mrs. Kuzek in my presence at that time read the copy to me or make any comparison between the duplicate and the original or

(Testimony of D. M. Taylor.)

the pencil copy. I could not say whether I used the same pen and ink as the others.

D. M. TAYLOR, a witness on behalf of the defendants, testified as follows:

I reside in Nome; I have known Mr. Elliott since the latter part of February, 1904; I first met Mr. Magaha and Kuzek on the 3d day of March; I was on the Marion Bench Claim, first on the 3d day of March; some time in the afternoon of the 4th of March, Mr. Elliott showed me a document that purported to be a lease of this claim.

Q. I will ask you to examine this paper and state whether or not the document which Elliott showed you, which purported to be a lease of these premises resembled that paper in appearance?

Mr. BRUNER.—Objected to for the reason that it is immaterial, incompetent, irrelevant, and not the best evidence.

The COURT.—Objection overruled.

A. Yes, something similar to that one on a blank form of lease. I examined the paper Mr. Elliott showed me very carefully; I read it over, the parties to the paper were Mr. Elliott and Magaha, as lessees, and Mr. Kuzek as lessor. Mrs. Kuzek's name was signed as a witness.

Q. I will call your attention to what is denominated as paragraph fourth in this one, and I will ask you to

(Testimony of D. M. Taylor.)

state what royalty this lease provided, if any, which was to be paid to the lessor?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent and not the best evidence.

The COURT.—Objection overruled.

A. It provided a royalty of 25 per cent; I was acting then as manager for the Beau Mercantile Company, engaged in the business of general merchandise.

(Mr. Bruner moved to strike out the evidence of the witness, on the ground that it is immaterial, irrelevant and incompetent and not the best evidence.)

The COURT.—Objection overruled.

FRED STREHLKE, a witness produced in behalf of the defendants, testified as follows:

I have known Elliott and Magaha and Kuzek since the latter part of February; I know the Marion Bench claim; about the first part of April at Magaha's cabin, on Peluk creek, Mr. Elliott showed me a document purporting to be a lease on the Marion Bench claim; I read the paper at that time; I do not remember the date of it; I don't know by whom it was signed; I never paid much attention to it; several names were signed but I only noticed one, Mr. Elliott's; there was a name signed as a witness, but I didn't notice who it was; it referred to the Marion Bench claim; it provided for the payment of 25 per cent royalty to the lessor; I read the lease over.

C. G. COWDEN, a witness produced on behalf of defendants, testified as follows:

I am cashier of the Alaska Banking and Safe Deposit Company, and reside at Nome; I have known Magaha and Elliott and Kuzek in the neighborhood of a year; I know where the Marion Bench Claim is, and have been on the ground myself. I remember the occasion about March of this year of being called on by Mr. Elliott and Mr. Taylor, and of the Beau Mercantile Company, and their showing me a paper concerning this claim; the paper was a lease of the Marion Bench claim, signed by Mr. Magaha, and Mr. Elliott and Mr. Kuzek; I don't remember if it was signed by any witness; I read the paper carefully as I would where it was a matter of importance that I should know what the paper contained; it provided a percentage to the owner of the claim; as I interpreted it, it was 25 per cent.

Q. State whether or not you had any particular reason at that time for examining it carefully?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent, not proper direct examination.

The COURT.—The objection overruled.

A. I did.

Q. What was the purpose or reason?

Mr. BRUNER.—The same objection.

The COURT.—The objection overruled.

(Testimony of C. G. Cowden.)

A. I examined the lease with reference to making a loan on the lay of Mr. Elliott and Magaha.

Q. Did you make that loan at that time?

Mr. BRUNER.—Objected to for the same reason as last.

The COURT.—The objection overruled.

A. I did; it amounted in the neighborhood of $1,900, or $2,000, in all advanced. I believe Mr. Elliott, Mr. Magaha and Mr. Taylor were all present at the time in the bank, the first time I examined the lay; I saw the lease a second time, but made no especial examination of it then; am not sure that I read it over then.

Cross-examination.

By Mr. A. J. BRUNER.—What I have stated is merely to the best of my recollection, after an examination; I am not willing to positively swear that the words were so and so.

D. M. TAYLOR, recalled, a witness produced on the part of the defendants, testified as follows:

On the 3d of March, last, I was on the Marion Bench Claim when there were present Mr. Elliott, Mr. Magaha, Mr. Kuzek, and a number of others, that I was not acquainted with; I held a general conversation with Mr. Kuzek and the others in his presence in relation to the lease on the premises between himself and Magaha and Elliott; the parties who took part in the conversation

(Testimony of D. M. Taylor.)

were Mr. Elliott, myself and Mr. Kuzek, if I remember rightly, the three of us.

Q. State whether this conversation related in any way to the amount of royalty to be paid to the lessor.

Mr. BRUNER.—I object to the question if it has reference to the matter which is now before the Court on the ground that it is immaterial, irrelevant and incompetent; second, that it is not the best evidence, and third, that it is inadmissible to contradict the terms of a written contract by any evidence of any contemporaneous or antecedent conversation between the parties.

The COURT.—This is a conversation prior to April 4th?

Mr. BRUNER.—Prior to the making the original in March.

Mr. ORTON.—I want to state in a general way what we offer to prove by this witness, so your Honor will be able to tell intelligently what is before the Court, I wish to prove at this time— I have several classes of admissions I wish to offer—in this particular case it is the statement of Mr. Kuzek which he made immediately prior and on the very same day of the drawing up of the original lease as to the terms of the oral lease under which they had been operating already, for almost three months; that that conversation took place immediately before the original was drawn, and within a few hours; that Mr. Taylor went down there for the

(Testimony of D. M. Taylor.)

very purpose of finding out what the terms of the lease were; and that he went to Mr. Kuzek and asked him, and then Mr. Kuzek told him and that Mr. Kuzek said we will draw the paper up right away. I want to state that I don't offer this evidence for the purpose of attempting to contradict or vary in any way the terms of the original agreement which was entered into between Magaha, Elliott and Kuzek, but to show what that contract was.

The COURT.—We will overrule the objection.

A. It did.

Q. State the conversation had in the presence and with Mr. Kuzek?

Mr. BRUNER.—This is all under objection as irrelevant, immaterial and incompetent; not the best evidence and improper, and attempting to vary the contents of a written instrument by parol evidence of a prior conversation.

The COURT.—I understand that; the objection is overruled.

A. He stated they didn't have any lease, and he said, "Here is Mr. Kuzek; he can tell you what it is and so can I"; he says, "We are to receive 75 per cent of everything we take out up to the 5th day of June, with the privilege of washing our dumps up any time after"; he says, "Isn't that right, Kuzek?" To which Mr. Kuzek replied, "Yes." He says, "You can take your papers up with you; we can make them out, and it won't take

(Testimony of D. M. Taylor.)

us ten minutes to sign them—you can take them up as you go"; that was the sum and substance of the conversation.

(Mr. Bruner moved to strike the answer out on the same grounds last stated, which motion the Court overruled.)

Q. How long in time was that, prior to Mr. Elliott's bringing you the lease.

A. That was the day before—the afternoon of the day before.

(Mr. Bruner moved to strike out the testimony relating to the conversation on the ground that when the offer of the testimony was made, counsel stated that it was the same day and but a few hours before the signing the lease; which motion was overruled by the Court.)

Q. They brought the lease to me the next day in the afternoon; I have lived in Nome and vicinity since the spring of '99; have been mining in Nome District, and various places; part of the time on claims of my own and part the time on claims of others.

Q. What character of mining have you done, with reference to mining yourself or under lease or leases?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent; which objection was overruled by the Court.)

A. Both. I mined property interested in myself, also on leases; I am working on a lay at the present time.

(Testimony of D. M. Taylor.)

Q. State whether or not you are familiar with the character and conditions of the country in the neighborhood of Nome with reference to its deposits of gold-bearing gravel and the character and nature and extent of it?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent, which objection was overruled by the Court.)

A. Yes; I have been somewhat acquainted with Peluk creek for the last year; I visited almost every mine from here to Hastings.

Q. Are you familiar with the amount of royalty which is usually paid or reserved by the lessor and lessee upon claims of the character and description as found on the Marion Bench Claim? A. I am.

Q. I will ask you if you are acquainted with the range of percentage which was paid to the lessor upon ground of the character and description of the Marion Bench Claim during the past year or two years?

A. Yes, sir.

Q. I will ask you to state what that percentage is or was during that period.

(To each of the foregoing questions, Mr. Bruner made the objection that they were immaterial, irrelevant, incompetent and not included within the issues, which objections were severally overruled by the Court.)

A. Twenty-five per cent was paid to the lessor, I could not say; I know of a great number.

Q. I will ask you to state what is the highest per-

(Testimony of D. M. Taylor.)

centage you have ever known to be paid on ground of a similar nature to that of the Marion Bench Claim?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent, and not within the issues in this case, and the witness has not shown that he is a competent judge of this matter; which objection was overruled by the Court.)

A. The highest percentage I know to have been paid on ground similar to this along the beach line is 25 per cent to the lessor.

(Mr. Bruner moved to strike out all the evidence of the witness with regard to the amount of the percentage in other lays or leases that had been made on Peluk creek, upon the ground that the testimony is immaterial, irrelevant and incompetent, and the witness is not shown to be competent to testify upon this matter, and that it is not included within the issues of this case; which motion was overruled by the Court.)

C. G. COWDEN, recalled for the defendants, testified as follows:

I was down at Peluk creek on the 8th of March; since June, 1901. I have been engaged in the business of banking and also been engaged in the business of mining.

Q. Have you with reference to whether you mined your own property or worked lays or let lays? State what your experience has been?

(Testimony of C. G. Cowden.)

Mr. BRUNER.—Objected to on the ground that it is shown that he is a banker, and if he has entered into mining speculations it does not make him competent to testify.

Mr. ORTON.—I expect to show that he has examined many mines for the purpose of loaning money on them.

The COURT.—The objection overruled.

A. I have been interested in property upon which we have let lays and I have worked property myself.

Mr. BRUNER.—It will be considered that all this character of testimony is under objection.

The COURT.—And all overruled.

Q. I will ask you whether or not you have had occasion since your stay in Nome to examine mines with reference to forming a judgment as to values?

A. I have.

Q. Did you make an examination of the Marion Bench Claim? A. I did.

Q. I will ask you if you are familiar with the mining claims on Peluk creek, and in the neighborhood, with reference to their kind and character and the nature of the gravel deposits?

A. I have examined a number of mines in that vicinity and know something of them.

Q. I will ask you if you are familiar with the usual rate of royalty that is paid upon mines at and near Peluk creek of the same kind and character as the claim in dispute? A. I am.

(Testimony of C. G. Cowden.)

Q. What is that rate?

A. Usually 25 per cent to the owner; however, it varies.

Q. What is the range?

(Mr. Bruner made the further objection that it called for the opinion of the witness; which objection was overruled by the Court.)

A. Thirty-five cents to the owner is the best that I have known on that character of ground in that vicinity.

Cross-examination.

I never had any experience in mining before I came to Alaska; I never worked in a mine, and never had charge of a mine as a foreman.

G. W. MARSH, a witness produced on behalf of the defendants, testified as follows:

I have lived in Nome since 1901; am acquainted with Marion Bench Claim, and have known Mr. and Mrs. Kuzek for some time; I became acquainted with Magaha and Elliott about the first of January; I have a lay on Mr. Snyder's ground near Peluk creek; it joins the Marion Bench Claim west of it.

Q. State whether or not you ever had any conversation with Mr. Kuzek in relation to the terms of the lay between himself and Magaha?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent; which objection was overruled by the Court.)

(Testimony of G. W. Marsh.)

A. I had several conversations with him in January.

Mr. BRUNER.—We ask that all questions be ruled out in regard to any conversation had prior to the time of signing the instruments, as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

A. The first conversation was held with Mr. and Mrs. Kuzek at my dump on the Snyder claim; I know it was in the month of January; the terms of the lay between Kuzek and Elliott and Magaha as to the amount of the royalty to be paid to the lessor was spoken of.

Q. State what was said by Mr. Kuzek on that subject at that time?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, if it is for the purpose of contradicting the terms of any agreements which were reduced to writing in the month of March by the parties.

The COURT.—Objection overruled.

A. He was talking there as to what kind of a lay we had there and asked what kind of a lay I had, and I said I had a very good lay; I didn't tell him what I had, but I said I had a very good lay; he said, "I am giving our boys 75 per cent, and I hope they will pull through"; that was before they struck the good ground, somewhere about the first of February. He said the boys were working very hard and had taken out a lot of dirt; the next conversation I had with him was some time in February at my dump; he spoke about the boys had struck it pretty good down there and was glad they had got it, and would pull through all right.

(Testimony of G. W. Marsh.)

(Mr. Bruner moved to strike out the last answers, as immaterial, irrelevant and incompetent.)

The COURT.—We will let it stand in.

The only time there was anything said about the percentage of royalty was on the occasion of the conversation in January; I have lived on Peluk creek since some time in November; since coming to Nome my business has been mining all together.

Q. I will ask you whether or not you are familiar with the mining claim situate on Peluk creek, and on the bench in the immediate vicinity with reference to the kind and character of gravel and deposits and the amount of gold contained there?

(Mr. Bruner objected to the question as being irrelevant, immaterial and incompetent; which objection was overruled by the Court.)

A. Yes, sir.

Q. Are you acquainted with the amount usually paid on claims situated in that vicinity on the creek and beach on similar claims, with the amount of royalty usually paid to the lessor, in case of leases during the past year?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid for the question. Which objection was overruled by the Court.

A. Yes, sir.

Q. What is that percentage?

A. It runs from 75 per cent to the lessor.

(Testimony of G. W. Marsh.)

Q. (The COURT.) The laymen, you mean?

A. Yes, 70 per cent is the least, to my knowledge. Magaha and Elliott first commenced to work the Marion Bench Claim sometime in December; at that time the claim had been mined some.

Q. Did you ever have any conversation with Mr. Kuzek as to the kind of ground the Marion Bench Claim was or the amount of pay it contained.

A. Yes, sir; about the 1st of December of 1893.

Q. I will ask you to state what that conversation was?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent and prior to the entering into the contract by the defendants and that there is no proper foundation laid.)

Mr. ORTON.—It was immediately prior or just at this time.

The COURT.—Objection overruled.

A. It was about the 1st of December, just before Magaha and Elliott went to work, I asked him how things was; he was prospecting, he had a hole sunk down; he said he was getting dirt running about a cent —two cents; I said, "That is pretty low grade for thawing." He said, "yes; it might be better."

Q. Do you know how soon after that the pay was struck on the Marion Bench Claim?

(Mr. Bruner objected as immaterial, irrelevant and incompetent.)

(Testimony of G. W. Marsh.)

The COURT.—Objection overruled.

A. I don't know exactly, but I think it was some time in February.

Q. By whom was it struck?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent.)

The COURT.—Objection overruled.

A. Struck by Magaha and Elliott.

Cross-examination.

When Mr. Kuzek was working he was working south from where Magaha and Elliott were working, it may have been 200 feet; I was working north of Kuzek's ground; I don't know much about the workings on the Kuzek ground.

WILLIAM SNYDER, called as a witness on behalf of the defendants, testified as follows:

I have been engaged in the business of mining in and about Nome since 1900; am acquainted with the Marion Bench Claim and own the adjoining claim to it; I know Mr. Kuzek, Mr. Magaha and Mr. Elliott; am pretty well acquainted with the mining ground on Peluk creek and vicinity, and have mined there myself; about the middle of March, 1904, I had a conversation with Mr. Kuzek with reference to the amount of royalty which he was to receive from Magaha and Elliott on the lease of the Marion Bench Claim.

Q. State what that conversation was, with reference to the amount of royalty which Kuzek was to receive.

(Testimony of William Snyder.)

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

(Which objection was overruled by the Court.)

A. One day going across the tundra, Mr. Kuzek and I met and we compared notes regarding lays; I asked him the conditions—under what conditions he had let his lay with his laymen, and he stated to me that he had given out a one year's lay to expire June 4th, I believe, at 25 per cent to himself and 75 per cent to the laymen. I remarked to him that in one sense of the word he had the best of me, as I had let my lay out for two years, but I was getting a better percentage than he was, as I was getting 30; I am to a certain extent familiar with ground on Peluk creek and vicinity with reference to the kind and character of gravel, and the amount of gold contained in it; I mined there myself and worked with my laymen; I know something about the amount of royalty which is usually paid on claims in that vicinity of this character.

Q. What is the amount of royalty usually paid to claim owners.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

(Which objection was overruled by the Court.)

A. On an average from 25 to 30 per cent to the owner.

THOMAS BARKER, a witness produced on behalf of the defendants, testified as follows:

My business is mining; sometime in the forepart of April I met Mr. Kuzek for the first time; I had a conversation with him then in reference to a lease on Marion Bench Claim as to the amount of royalty he was to receive.

Q. State what that conversation was.

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent and not within the issues of this case.

The COURT.—Objection overruled.

A. We was talking about panning in the mine; he was panning on bedrock, and he said to look at the prospect; and I says, "Is that a prospect from the pay-streak"; and he says, "No"; he says, "It is off bedrock which they left." I says, "The boys have got a pretty good thing here"; he says, "Yes, they have got a good thing." I thought I knew where to hit him, and I says to him, "What are you giving them?" and he says, "I am giving them 75 per cent and they want to run over it"; he says, "they are leaving too much of the bedrock." We held the conversation in the boiler-room; it was very short; I never met him before or since.

J. E. BARKER, a witness produced on behalf of the defendants, testified as follows:

I am acquainted with Mr. Kuzek, Magaha and Elliott, and with the Marion Bench Claim; about the middle of March I had a conversation with Mr. Kuzek in reference

(Testimony of J. E. Barker.)

to the amount of royalty he was to receive from Magaha and Elliott, on the Marion Bench Claim; it was held in the drift.

Q. State that part of the conversation with reference to the amount of royalty that he was to receive.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and an attempt to contradict the terms of the agreement which was afterwards reduced to writing.

The COURT.—Objection overruled.

A. I was going into the drift and he was coming out with a pan of bedrock that he had panned in the hole; he showed it to me—the prospect. He says, "That is pretty good for being on the bedrock." I says, "Yes, sir," but I says, "It is pretty hard to get it all, and we are going into bedrock pretty deep in some places." He says, "Yes, but they are not careful enough; they are getting a pretty good thing and I think they ought to be careful." I says, "How much are they getting," and he says, "75 per cent." I says, "That is pretty good." I never had any other conversation with him about the same matter.

THOMAS JACOBS, a witness produced on behalf of the defendants testified as follows:

I know Kuzek, and Elliott and Magaha and the Marion Bench Claim. I had two or three conversations with Mr. Kuzek in relation to the amount of royalty he was to

(Testimony of Thomas Jacobs.)

receive from Magaha and Elliott under the lease on the Marion Bench Claim. The first conversation was some time in the latter part of February, in Kuzek's cabin on the Marion Claim.

Q. What did Mr. Kuzek say at that time with reference to the amount of royalty that he was to receive?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent and on the ground that it was before the contract was reduced to writing.

The COURT.—Objection overruled.

A. He told me he was getting 25 per cent himself, and 75 per cent to Magaha and Elliott; the next conversation was about the middle of March, in his cabin on Peluk creek, Mrs. Kuzek also being present.

Q. State with reference to this matter as to the amount of royalty.

Mr. BRUNER.—Objected to the question as immaterial, irrelevant and incompetent.

The COURT.—The objection overruled.

A. The same amount of royalty; he said he was giving the boys 75 per cent and that he was getting 25. I have resided in Nome since the spring of '99, and have been mining most of the time, to a certain extent—I worked there a part of the time this winter—and am acquainted with claims on Peluk creek and its benches or claims in that vicinity with reference to the kind and character and kind of gravel and amount of gold therein. I am acquainted with the amount of royalty which

(Testimony of Thomas Jacobs.)

is usually paid to owners upon claims situated upon Peluk creek and vicinity.

Q. What is that now?

Mr. BRUNER.—Objected to on the grounds as heretofore stated.

The COURT.—The objection is overruled.

A. Twenty-five per cent; I have heard of cases where 30 per cent was paid to the owner.

Cross-examination.

I first went out on this claim in the latter part of February; had been out there before looking over the country. I didn't have any particular knowledge of the mines in that particular section. I had been down there two years ago when they struck pay, on the claim adjoining this mine, and I was trying to get a lay there on this ground myself, if I could; that's the only knowledge that I had prior to this winter in regard to Peluk creek; I know some parties who took a lay further down on the same pay-streak; they was getting 75 per cent for working the ground. I don't know what the Homer Bench Claim was leased for; I haven't gone through the mines and examined them. I worked on the Marion Bench Claim on the boiler most of the time; I worked all over the mine.

Redirect Examination.

Q. Did you ever have any conversation with Mr. Kuzek as to the amount of money his share, his royalty, would be.

(Testimony of Thomas Jacobs.)

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled.

A. Yes, sir; about the middle of March in Kuzek's cabin, Mrs Kuzek being present, he said Charley told him that they would take $25,000 out and that his share would be $6,000, and possibly it might run up as high as $7,000 before they got through.

Q. How did you happen to have this conversation with Mr. Kuzek?

Mr. BRUNER.—I object to that question as being irrelevant, immaterial and incompetent.

The COURT.—Overruled.

A. I went there to get a lay on a fraction he had there. He said that he would not give a lay on the fraction; that he wanted to sell the claim and the fraction, and everything that he had. I asked him his price and terms and he told me for $23,000 he would sell the fraction and the claim and the building and the house and everything that he had there and his share in the dumps. I asked him his terms and he said he wanted $3,000 cash down, and to take his share out of the dumps and security on the claim for the money and wanted it all paid in July. I asked what his share would be in the dump and he says, "Charley told me they surely would take out $25,000 this winter, the way the dirt runs now; my share will probably be $6,000." He thought it might be as high as $7,000.

(Testimony of Thomas Jacobs.)

(Mr. Bruner moved to strike out the answer on the ground before stated.)

The COURT.—The motion overruled.

Recross-examination.

I should say it is one of the best claims I know of where they struck the pay there. There is a good spot there. If I owned that claim, and knew how to work it myself, and had the pay located as good as they have it there, I would not let it out for 25 per cent. When I went to work on the 23d of March I would not have rented the property for 25 per cent.

JOHN MAY, a witness produced on behalf of the defendants, testified as follows:

I have met Mr. Kuzek twice, both occasions being in April last; I met him on the trail between his claim and Nome; I had been out to his claim and residence.

Q. What did you go there for?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. To see Mr. Kuzek in regard to purchasing his claim. I had a conversation with him in relation to the Marion Bench Claim, N. V. Johnson being with me.

Q. State the substance of that part of the conversation wherein he stated the amount of royalty he would receive from the laymen, Magaha and Elliott?

(Testimony of John May.)

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. I met him and told him I understood his property was for sale at a given amount and I asked him if the royalty he received would be applied on the purchase price, and he said it would, and I asked him the amount and he said 25 per cent. This was about the 20th of April.

N. V. JOHNSON, a witness produced on behalf of the defendants, testified as follows:

I do not know Mr. Kuzek, but met him once on the trail between here and Peluk creek in company with Mr. John M. May. I had been on the Marion Bench Claim on that day.

Q. How did you happen to go down there—just generally?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. I was employed to go down there for the purpose of investigating the Marion Bench Claim, and did examine it to a certain extent. Mr. May had a conversation in my presence with Mr. Kuzek on the trail; some conversation was had about the amount of royalty which he was to receive from the laymen, Elliott and Magaha.

Q. Just state that part of the conversation wherein

(Testimony of N. V. Johnson.)

he mentioned the amount of royalty with enough of the balance of the conversation to make it intelligible.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. We met Mr. Kuzek on the trail, and Mr. May asked him if his name was Kuzek—neither of us knew him—and he said it was. I can identify the man now; I have seen him once or twice since. Mr. May told him that he understood that his ground was for sale, and Kuzek said it was. Mr. May asked him in regard to the lay, and he said it expired some time about the first of June. He asked him what royalty he was to receive therefrom and he said 25 per cent. Nothing further was said in the conversation about royalty. I have been a miner for 22 years, and have lived in the Nome District ever since 1900.

Cross-examination.

In the conversation between Mr. Johnson and Mr. Kuzek, Mr. May asked the question whether 25 per cent went to the lessor, and Kuzek said "Yes, sir."

CHARLES MARSH, a witness produced on the part of the defendants, testified as follows:

I have known Mr. Kuzek since about February last. I live in Nome and know the Marion Bench Claim. I worked on the Snyder Bench, near Kuzek's mine. Along in the forepart of March, I had a conversation with Mr. Kuzek with relation to the amount of royalty which he

(Testimony of Charles Marsh.)

was to receive from the lay on the Marion Bench Claim; it was held in his cabin, and was the only conversation I ever had with him. Kuzek asked me how much royalty we were receiving, and I told him we were receiving 70 per cent. He says, "I am doing better by the boys; I am giving them 75 per cent." He did not mention Magaha and Elliott's name; he only used the word "boys."

RALPH GEARTNER, a witness produced on the part of the defendants, testified as follows:

I know the Marion Bench Claim and have know Kuzek since the fall of 1900. I had a conversation with him about the amount of royalty he was to receive from the claim this spring, for last winter's work. I had many conversations with him in regard to the claim—laymen, but that conversation was the only one which mentioned the price. It was pretty late this winter or early this spring—the early part of March or the middle of March; it was in his cabin, Mrs. Kuzek being present. He said the boys were getting 75 per cent, and that they had a pretty good thing of it.

Cross-examination.

I have been in Alaska since 1893, and came to Nome in 1900. I have been mining, and seafaring is my business. I have always been very friendly with Mr. and Mrs. Kuzek, and have been at their cabin eight or ten times since Christmas; remember of having a conversation

(Testimony of Ralph Geartner.)

with Mrs. Kuzek in the latter part of May of this year at her cabin. We talked over their troubles between Kuzek and Magaha and Elliott; did not tell her what my testimony in the case would be. I did not state to her at that time and place in her cabin that I was short of money and that if she would give me some money, I would help her out in this case; I do not recollect stating any words to that effect.

JOHN GREVE, a witness produced on behalf of the defendants, testified as follows:

I know Mr. Kuzek, Magaha, Elliott and the Marion Bench Claim. In the latter part of November, 1903, I had a conversation with Kuzek, in which he stated to me how much royalty he was to receive from Magaha and Elliott.

Q. State the conversation.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose and for the reason that under the testimony of the witness the coversation was held prior to the time the lay was given, which afterwards was reduced to writing.

The COURT.—Objection overruled.

A. Mr. Kuzek told me that he had let the lay out already to Magaha and Elliott for 25 per cent to himself, and 75 per cent to the laymen.

T. M. REED, a witness produced on behalf of the defendants, testified as follows:

I am an attorney, United States Commissioner and Ex-officio Recorder, and know Mr. Kuzek, Mr. Magaha and Mr. Elliott. I remember the occasion of a lay lease on the Marion Bench Claim, signed by Mr. Kuzek, and Magaha and Elliott being brought to my office by Mr. Elliott, Mr. Magaha, Mr. Cowden and Mr. Taylor of the Beau Mercantile Company; they all came in together.

Q. For what purpose did they bring it to you?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled.

A. Mr. Taylor and Mr. Cowden were going to let Mr. Magaha and Elliott have some money on their dumps—that is, Mr. Taylor for the Beau Mercantile Company—and they desired some security and they came in to have me draw up a chattel mortgage on the dump. I examined the lay paper, and my best remembrance is it provided for a royalty of 25 per cent to the owner of the claim. I drew up the mortgage.

Cross-examination.

I have no positive recollection; I can place the mortgage in my mind now, and it is possible for me to be mistaken in this matter.

FRED STREHLKE, recalled on behalf of the defendants:

Q. Mr. Strelkhe, did you ever have any conversation with Mr. Kuzek, in relation of the amount of royalty he was to receive from Magaha and Elliott from the lease on the Marion Bench Claim?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. Yes, sir; about the 1st of April in the drift; I asked how much royalty the boys were getting and he said 75 per cent.

(Mr. Orton here offered in evidence the mortgage referred to by Judge Reed in his testimony, which was admitted in evidence without objection.)

WILLIAM ELLIOTT, recalled for the defendants:

Q. Mr. Elliott, how many days did you and Mr. Magaha prospect on this claim before you and Mr. Kuzek agreed on the terms of the lay?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose, it being prior to the agreement and contract.

The COURT.—Objection overruled.

A. Part of two days. Mr. Kuzek was present at the time; the character of pay we found was on a small order—very little pay; Mr. Kuzek showed us the pay himself; he worked in the shaft and Mr. Magaha did part

(Testimony of William Elliott.)

of the panning and worked on the windlass; we panned eight pans including the black sand during the two days, and Mr. Kuzek weighed the pans and said it was 23 cents; that was all the prospecting we did before we agreed on the terms of the lay; it was thawed or frozen ground, possibly 14 feet deep to the pay; we sunk one shaft 7x3 and 1/2 feet in size, 14 or 15 feet. We agreed upon the terms of the lay in Mr. Kuzek's house. He was to give us 75 per cent. We went to work on the 11th day of December, 1903. We struck pay on the 29th day of January; until pay was struck, besides Magaha and myself only one other man worked; from February on, eight men in all were at work. We took out in the neighborhood of 46,000 buckets, 9 pans to the bucket. I remember the occasion when Mr. Taylor came to our place and the conversation had between myself, Mr. Kr. Taylor and Mr. Taylor in the engine-house just prior to the time when the laywas reduced to writing. Mr. Taylor asked if he could be shown down to examine the ground. I asked Mr. Taylor if he thought the ground would justify him in advancing us some credit on it. That was in Mr. Kuzek's presence, before the contract was reduced to writing, and Mr. Taylor answered "Sure, I think it will."

(To each and every one of the questions embodied in the foregoing testimony, the plaintiff objected that it was immaterial, irrelevant and incompetent, tending to contradict the terms of an agreement afterwards reduced to writing, and not the best evidence; which said objections were severally overruled by the Court.)

(Testimony of William Elliott.)

Mr. Taylor asked when I would be in town, I told him possibly the next day. He told me to bring my lease with me. I told him it wasn't made out yet; that we just had an oral agreement between us. I said, "We get 75 per cent of what comes out of the ground up to June 5th; Kuzek can tell you the same"; and Kuzek says, "That is right; you can get your paper right off and take them up with you." The next day we reduced the agreement to writing. I first discovered that I made an error in the duplicate somewhere between the 20th and 25th of April.

CHARLES F. MAGAHA, recalled for defendants.

Mr. Elliott and I and Mr. Kuzek prospected this claim a day or two before we definitely agreed on the terms of the lay. The ground was frozen and we used Mr. Kuzek's thawer. Before we made a definite oral agreement about the lay, the pay was very low grade, in the neighborhood of two or three cents a pan. *It between* the 18th and 22d when we definitely agreed on the lay. Mr. Kuzek was to receive 25 per cent of the gold to be taken out, and Elliott and myself were to receive 75.

(To the foregoing testimony, and to each and every question embodied therein, the plaintiff objected, on the ground that it was irrelevant, immaterial and incompetent and not the best evidence; which objections were severally overruled by the Court.)

(Testimony of Charles F. Magaha.)

(Mr. Orton offered in evidence photographs of Plaintiff's Exhibits Nos. 2 and 3, which were admitted without objection.)

C. G. COWDEN, recalled for defendants.

I have done all the duties of an employee of a bank from collection clerk to cashier. I was paying teller in the National Bank of Commerce of Tacoma, for about eight years, and have had experience in the examination of signatures, drafts and other papers, with reference to erasures and alterations.

(Witness being handed Plaintiff's Exhibits Nos. 2 and 3, and the photograph which is marked Plaintiff's Exhibit No. 2, stated:) In my opinion the word "his" written in ink in the line where it says "pay to the lessor or his legal representatives or assigns," and the word before "legal representatives and assigns," in the 4th paragraph, written in pencil in exhibit No. 3, are not in the same handwriting. In my opinion the word "his" where it appears in the last line of paragraph 4, written in pencil, and the word "his" at the same place in the ink one, were written by the same hand. In my opinion the word that is written in pencil before the word "legal" is probably "her"; the word "her" written in pencil, looking at it with the naked eye, appears to have been changed. I do not think the words in figures written in ink in exhibit No. 2 and the same figures on exhibit No. 3, written in pencil were written by the same person. In my opinion the figure "5" in exhibit No. 3,

(Testimony of C. G. Cowden.)

and the figure "5" in pencil in paragraph IV, in the same exhibit where it occurs in the word "75," were written by the same person; the figure "7," before the word "volume" where it is written in ink in exhibit No. 3, and the figure "7" in paragraph IV, have the same characteristics and I believe were written by the same hand. In every case where I see a "5" written in this paper, that is, the tails of the "5" have been connected with the "5"; it has an upward tendency; a person who makes a "5," or any figure with a stroke to it that way, usually makes the stroke very much the same. It has a back and upward turn to the tail of the "5"; the shape of the figures are so similar as to lead one to decide that they were written by one man. There is no similarity between the pencil "5." and the ink "5" in exhibit No. 2, and a person making a "5" of that character would not, in my opinion, make a "5" of that character; the entire style is different. Referring to the "7" in paragraph IV in "75," and the figure "7" just before "volume," I would say that the characteristics in making these two "7's" are the same, yet they are not the same. One is made in pencil in one place, and the other in ink, and I would say that the same hand didn't make these two; the same difference exists between the two "7's" just referred to, and the figure "7" immediately before the word "volume," in exhibit No. 2 and the pencil "7" in paragraph IV of exhibit No. 3, they don't have any of the characteristics. In examining the word immediately before "legal" with the glass, in exhibit No. 3, I think there

(Testimony of C. G. Cowden.)

is an erasure. I was going to add to that, however, that the surface of the paper is itself so dirty and ruffled up that it makes it hardly possible to decide that there has been an erasure; still, it has that appearance.

Cross-examination.

Q. (By Mr. BRUNER.) You have a great deal of interest in this case—a great deal of feeling?

A. I have most certainly feeling in the matter.

Mrs. BERTHA KUZEK, called on behalf of the defendants, testified as follows:

Q. I would like to have you look at Exhibit No. 3, and state whether or not you wrote any part of that instrument? A. No, sir I did not.

Defendants thereupon rested.

BERTHA KUZEK, a witness called on behalf of the plaintiff, testified as follows:

I am the wife of Stanley Kuzek, the plaintiff in this action. I am living on the Marion Bench Claim on Peluk creek. I know Mr. Magaha and Mr. Elliott. I remember the occasion of the signing of a lease by my husband, Mr. Magaha and Mr. Elliott, on the 9th day of March of this year. I know that it was the 9th day of March when the four of us made out the original lease and Mr. Kuzek took care of the boiler while Mr. Magaha and Elliott went to town. I know that it is the only

(Testimony of Mrs. Bertha Kuzek.)

afternoon and night that he ever took care of the boiler and night. I went to work for Magaha and Elliott, and got the first meal for them at supper time, on the 3d of March of this year. I told Mr. Elliott that we could not take them on the 1st or 2d because Mr. Kuzek had not fixed the stove so that we could take them. Mr. Elliott brought over some provisions on the afternoon of the 3d, and that was the day I went to work. The original lease was signed on the 9th of March; I have it in a memorandum-book.

Q. Was there any other circumstance by which you can fix that time?

Mr. ORTON.—Objected to as the witness has already stated how she fixed the time.

The COURT.—Objection overruled.

A. It was Wednesday night. I asked Mr. Elliott if he would kindly bring the "Nugget" up. I was a subscriber for the "Nugget"; and Elliott didn't come back and I hadn't asked Magaha to get the paper, so I didn't get it. I recognize the paper marked Plaintiff's Exhibit No. 3. I have seen it since December. Mr. Kuzek wrote, beginning at the top and reading down; "5th day of December, 1903—Stanley Kuzek—Nome—" "Cape Nome—Marion Claim—J. P. Currie—12—July—'99—Aug.—1899—'97—XVI"; that is all that Mr. Kuzek wrote on that paper. Mr. Elliott wrote the rest of it. Mr. Elliott wrote the figures "1903" between the words "of" and "year"; he also wrote

(Testimony of Mrs. Bertha Kuzek.)

the figure "4" where it says "A. D. 190 "; also the figures "15" in paragraph 1st between the words "the" and "day"; also the words, "November, 1903," in paragraph 1st; also the letters "Mo"; also the word "h-e-s." in the 4th paragraph between the words "or" and "legal"; also the figures "75" in paragraph 4th between the words, "assigns" and "per cent." He also wrote the balance of the pencil words in that paragraph. When he wrote it Mr. Elliott, Mr. Magaha, Mr. Kuzek and myself were all in our cabin on the Marion Bench Claim. Mr. Kuzek said we might draw the paper up and Mr. Elliott was there, and said, "We will draw up a copy first," and Mr. Kusek had this drawn, this copy sometime in December, and Mr. Elliott said, "We will find this out first." Mr. Kuzek had attempted to write it and was going to start in and Mr. Elliott said, "I could perhaps write it better than you could." He said that to Mr. Kuzek, so then Mr. Elliott took the paper and sat down and wrote this part which is written in pencil and read it as he wrote it out. He read, "Pay to said lessor or"—"his"—he wrote "his" and read it, "legal representatives or assigns" and wrote the figures "75" and said "75 per cent of the gross output of said claim during"; then he wrote the year "ending"; he wrote "ending" and so on down. He wrote "June" and spelled it as he wrote it out; "the 5, 1904," and so on until it was finished; he concluded to write another one as this was not a good copy, being part in lead pencil and part in pen and ink; it was better to write it fully out in one handwriting with a pen and

(Testimony of Mrs. Bertha Kuzek.)

ink, and I said to Kuzek that Elliott and Kuzek and Magaha better go down and get an attorney or notary public to make out the paper, and Mr. Elliott said that he could make them out just as good as anybody else, so he took the paper and pen and wrote it down following after the one he had there. When he wrote the first original, the first lease that was right on top, this was right under and as he went on down, he followed it up—what he had written. After he got it written, Mr. Kuzek held this paper while Mr. Elliott read the other one—the original, and compared the papers to see if they were all right; then he handed the paper over to Mr. Kuzek to look over and read—he didn't read it—he handed it to me, and I read it over, the original, and Mr. Kuzek held the other one—the pencil one in his hand, and I read it aloud, and he compared it as I read. Then I handed it back to Mr. Kuzek, and Mr. Kuzek signed, then Mr. Magaha signed, then Mr. Elliott signed and I signed as a witness; then Mr. Kuzek wanted him to draw up another paper for him that we should keep, and Mr. Elliott says, "Well, it is late"—it was about 2 o'clock—and he says, "We are bound to meet a party in town; I will make out the other copy to-morrow," he says. Well, Mr. Kuzek thought it was all right and they went to town that afternoon, and Elliott didn't come back that next day. He was in town for about a week or ten days; then he stayed at home about two or three days—I couldn't say how long—and again went to town and stayed a couple of weeks. He

(Testimony of Mrs. Bertha Kuzek.)

came out again about the 2d of April, but I know he was not there the 1st of April, and worked about two days, and then Mr. Kuzek called his attention to drawing up the copy of the lease, so we could have one as well as they had. After supper, on the evening of the 4th of April, Mr. Kuzek, Mr. Elliott and myself, only being present—Mr. Magaha was not there—and while we were all sitting at the supper table, Mr. Elliott wrote out this paper, the duplicate. He laid the original lease on the table before him when he wrote this out and also the pencil lease was laying on the table at the same time; he wrote on down followed the original with this, and followed this on down as he did the first—the pencil one; and then after he got through with the writing of it, he handed the original over to Mr. Kuzek, and Mr. Elliott read this one out to the three of us, while Mr. Kuzek was holding the original; after he got through, he handed the piece of paper to Mr. Kuzek, .and Mr. Kuzek looked it over and said he guessed it was all right. Mr. Kuzek handed this paper to me, still holding the original in his hand and the pencil lease, and I started and read this over aloud. Mr. Kuzek said, "All right; it is alike"; and I handed it back to Mr. Kuzek and he put the two papers together, and then he signed this lay and then he put it back to Mr. Elliott. Mr. Elliott signed, and then I signed as a witness, and then when Mr. Kuzek wanted to go over and call Mr. Magaha —he was working on the boiler at the time—Mr. Elliott says, "No, it is no hurry; Mr. Magaha can sign it to-

(Testimony of Mrs. Bertha Kuzek.)

morrow." Then the next following day, on the 5th of April, right after dinner, Mr. Kuzek called him into the little room we had and he signed this lay. I was standing in the door when he signed this; he read it before he signed it, and said it was all right, and handed it back to Mr. Kuzek, and it has been in Mr. Kuzek's possession, you might say, until it came into court. After the original was signed on the 9th of March Mr. Kuzek kept the pencil copy, and put it away with some other papers. I know two men by the name of Marsh. I was present at a conversation between my husband and Mr. G. W. Marsh; it was some time in March or April.

Q. In that conversation, did Mr. Kuzek ask Mr. Marsh if he had a very good lay?

A. He didn't say anything like that.

Q. And then did Mr. Marsh state to your husband that he had a very good lay?

A. He did not state anything like that in my presence.

Q. And then in that conversation, did your husband state to Mr. Marsh, "I am giving our boys 75 per cent and I hope they will pull through?"

A. No, sir, not to the best of my recollection did he ever state anything like that in my presence to Mr. Marsh. I have been slightly acquainted with Thomas Jacobs in the last two or three months.

Q. Do you remember a conversation alleged to have taken place in your cabin between Mr. Jacobs and your husband alleged to have been about the middle of March

(Testimony of Mrs. Bertha Kuzek.)

of this year, in which Mr. Kuzek told Mr. Jacobs that he was getting 25 per cent himself, and giving 75 per cent to Elliott and Magaha.

A. No; he asked Kuzek what he was getting and Kuzek replied that he was getting 75 per cent.

(Mr. Orton moved to strike the answer out as irrelevant, immaterial and incompetent.)

The COURT.—Objection overruled.

Q. Did your husband state to Mr. Jacobs at that time that he was giving the boys 75 per cent, and that he, Kuzek, was getting 25 per cent.

A. No, sir, not in my presence he didn't mention anything about it; during that conversation he did not refer to Mr. Magaha and Elliott as "the boys." I remember the conversation held some time in March or April, but to the best of my recollection nothing was said in regard to the terms of the lay which had been given by my husband to Magaha and Elliott.

Q. Did your husband ever state to any person in your presence that he had given a 75 per cent lay to the boys or the laymen? A. No, sir.

Q. Or retain 25 per cent of the gross proceeds for himself? A. No, sir, he didn't.

Cross-examination.

(By Mr. ORTON.)

Q. Now, Mrs. Kuzek, you say this document, Exhibit No. 3, the pencil draft, was presented by your husband already partially drawn up?

(Testimony of Mrs. Bertha Kuzek.)

A. Part of it was already.

Q. And Mr. Elliott drew up the balance of it, that is, wrote out some words and figures in pencil?

A. Yes, he wrote it out in pencil.

Q. And he started at the top and he went along and filled in the figures?

A. The pencil marks, you mean?

Q. He started at the top and read along until he came to a blank space and filled it in?

A. Where it is written with a pencil he started.

Q. That is down about the middle of the page?

A. Down pretty near the middle of the page.

Q. He first started in about the middle of the page?

Q. Now, the first pencil writing that he commenced to write is down near the center of the page?

A. Whether it is right in the middle or not, I couldn't say.

Q. It was not near the top?

A. Mr. Kuzek wrote that in with pen and ink.

Q. Mr. Elliott began down about the middle of the page? A. He began—yes, sir, a ways down.

Q. How far down from the top?

A. About where he commenced, it is saying something about 1900, some figures that I can't remember them.

Q. You are sure that he didn't commence right upon the first or second line to write?

A. No, I didn't say that.

(Testimony of Mrs. Bertha Kuzek.)

Q. Did he?

A. Did he commence at the top there—I said Mr. Kuzek wrote that.

Q. When Mr. Elliott commenced to write the paper he commenced to read it at the same time?

A. He didn't read the top; he read what was wrote in below.

Q. I will ask you to read then just exactly what he wrote and read then. Show me where he began to read?

A. Here, he put a figure down there.

Q. He put down the figure "1903"?

A. And said 1903.

Q. He said "1-9-0-3"? A. Yes, sir.

Q. And then what did he read?

A. He didn't read that (indicating).

Q. Didn't read that?

A. He just read what he put down.

Q. After he got down to the fourth paragraph, he began to read the printed words?

A. After he wrote it, he read it.

Q. Just show where he first began to read the printed lines.

A. He wrote that—he wrote that—

Q. He wrote this November, did he?

A. Yes, sir.

Q. Then he went to reading the printed words?

A. No, he didn't read that; all he read was just what he wrote.

Q. Did he read the printed matter?

(Testimony of Mrs. Bertha Kuzek.)

A. "M-o," mouth that meant, "8"—

Q. Show me the first printed matter he read?

A. "Legal representative or assign," he wrote, "75," he said "75."

Q. Did he read this printed matter here? Did he read that out when he was writing?

A. I think he did.

Q. What was the first printed matter that he read out? A. The first printed matter?

Q. The first printed matter that he read out loud while he was filling in this paper. Show us the first printed matter that he read when he began to write?

A. You want to give it in figures?

Q. I want you to give me the first printed words that he said out loud. A. "Charles F. Magaha."

Q. That is written words; I mean printed words.

A. Printed, oh, well, that is different. "To pay to said lessor, his legal representatives or assigns." He wrote, "75 per cent."

Q. That was the first printed words that he read out loud, was it? A. Yes.

A. "Legal representatives—

Q. That is the first printed part that he read out loud, is it, Mrs. Kuzek? Talk out loud, please.

A. He read it—he read this printed matter out that he read as he wrote.

Q. Where did he begin to read the printed matter? Please show me where he began to read the printed matter?

(Testimony of Mrs. Bertha Kuzek.)

A. You mean what he wrote down?

Q. I mean when he was writing it down.

A. He looked over this until he came down here and then he commenced—

Q. When did he first begin to read out—show me where he first began to read out?

A. "Pay to said lessor, his legal representatives or assigns."

Q. What is this word between "lessor" and "legal" there? A. "His."

Q. How do you spell "his"?

A. Some people spell when writing.

Q. How do you spell it?

A. Sometimes I make mistakes.

Q. That is the first place that he began to read the printed matter when he was writing it in?

A. "Said lessor, his legal representatives or assigns."

Q. Did he continue reading it down to the bottom?

A. He read what he wrote; that was all.

Q. He read what he wrote? What was done after he got through writing, got that filled up?

A. He got the original and put this on top in front of him. If you wish me to, I will show you. He put the original here and read down.

A. No, I don't care for any. He wrote down on the original the same as he had down there.

Q. Did he say it out loud as he went along writing the original? A. He didn't do that.

Q. Did he say that? Did he read it out loud?

(Testimony of Mrs. Bertha Kuzek.)

A. No, he didn't.

Q. He went right along and finished it?

A. He went right along and finished it.

Q. Then what did he do?

A. Then he read it over and Mr. Kuzek held this pencil copy.

Q. Mr. Elliott read over the original and Mr. Kuzek held this in his hand and compared it as he went along?

A. Yes.

Q. What did he do then?

A. Gave Mr. Kuzek this and had him sign it.

Q. Mr. Kuzek held the draft in his hand and Mr. Elliott had the original in his hand? A. Yes.

Q. And Mr. Elliott read it all over from beginning to end? A. Yes, the original.

Q. Did you read it over at that time?

A. No, he handed the original to Mr. Kuzek.

Q. So then you didn't read either of them over at that time?

A. Not when Mr. Kuzek first read that, he handed the original to Kuzek.

Q. I thought you said that Mr. Kuzek was holding the draft?

A. He held this while Elliott was reading the original.

Q. Where were you at that time?

A. I was in there.

Q. Were you looking at it?

A. No, I was listening.

(Testimony of Mrs. Bertha Kuzek.)

Q. After Elliott got through reading it, did you then read it over before it was signed?

A. He handed the original paper to Mr. Kuzek for him to look over and to sign, and he looked it over, the first line or two, and handed it over for me to read, and Mr. Kuzek held this one.

Q. (By the COURT.) Did you read it aloud or otherwise? A. I read it out loud.

Q. Mr. Kuzek held this draft in his hand?

A. Yes.

Q. Was he looking at it while you were reading?

A. I couldn't tell; I was reading the original.

Q. Was he looking over while Mr. Elliott was reading?

A. I think he was, he held it for to compare it.

Q. What did he say after he got through reading that over? A. After I got through?

Q. After Mr. Elliott got through reading it and he with holding this in his hand?

A. Kuzek?

Q. Yes. A. He told Kuzek to sign.

Q. What did Kuzek say?

A. He looked the original over and handed it back to Mr. Elliott, and he handed it back to him to sign.

Q. What did Mr. Kuzek say?

A. He looked at the paper and signed the original, and then Mr. Magaha signed—

Q. What was signed at that time?

(Testimony of Mrs. Bertha Kuzek.)

A. Said that they should sign and Mr. Kuzek and Mr. Magaha sign and Mr. Elliott sign, and Elliott says to sign as a witness, and handed the paper over to me—

Q. After Mr. Elliott finished reading the original, when Mr. Kuzek was holding this paper—when Mr. Elliott got through reading the original, did Mr. Kuzek say anything about it being correct or anything of that kind?

A. After Elliott got through—why Elliott said he guessed it was all right, and said something of the kind, and handed the original—

Q. Did Mr. Kuzek say anything of that kind?

A. I handed the paper over to Kuzek, and Mr. Kuzek looked it over, I said, and he passed the paper over to me, and said to read it.

Q. That was the first word that he said, was it?

A. Yes, sir; he says to read it over, and I read it and handed it back to him, Mr. Kuzek, to sign.

Q. Then what did Mr. Kuzek say?

A. He signed it.

Q. What did he say?

A. He said it was all right; he had read it and compared it, and he said that it was all right; I am tired of hearing this repeated.

Q. Did Kuzek say anything about the paper being like the one in his hand?

A. Yes, said it was all right.

(Testimony of Mrs. Bertha Kuzek.)

Q. Said it was just like the one he had in his hand, that he was reading from? A. Yes.

Q. Then you read out loud, and he compared it again —that is a fact?

A. I said Kuzek held this penciled while I was reading the original.

Q. Did he compare it at the time?

A. While I was reading it? I suppose he was.

Q. When you got through he said it was alike?

A. He said it was alike; I handed the paper back to Mr. Kuzek, the original, and he signed it.

Q. Now, then, that was according to your recollection on the 9th of March? A. Yes, sir.

Q. Was Mr. Taylor down there that day?

A. Not to my knowledge.

Q. Had Mr. Taylor been there before that, of the Beau Mercantile Company?

A. I think he was there.

Q. About a week before that, or something like that?

A. On the 3d.

Q. Do you say on the 3d?

A. He was to my cabin.

Q. You didn't see him out in the engine-house, did you? A. No, sir.

Q. It was about the 3d, then, that Mr. Taylor was down there?

A. Yes, sir, it was the day Mr. Elliott was moving provisions to my cabin.

(Testimony of Mrs. Bertha Kuzek.)

Q. Did Mr. Elliott go to town that day?

A. I could not say.

Q. Did he go to town the next day?

A. I don't think he did.

Q. You don't think he did?

A. The afternoon of the 3d, we were moving provisions in the afternoon. On the 4th he was also moving provisions in from the cabin.

Q. He could not very well be on the creek between two and five in the afternoon of either of those days—it would be impossible to be in Nome witout your knowing it?

A. It don't take over half an hour to go to town—between that time I couldn't say. I know he brought the provisions over the afternoon of the 3d and the afternoon of the 4th.

Q. Is it not possible that he went to town the afternoon of the 3d or 4th?

A. I know the time that he furnished the provisions.

Q. What time?

A. I could not state the exact hour; it was in the afternoon.

Q. How long did he work the afternoon of the 3d?

A. What do you mean, how long did it take to carry the provisions over?

Q. Yes.

A. I couldn't state that.

Q. How long did it take the afternoon of the 4th?

A. I could not say.

(Testimony of Mrs. Bertha Kuzek.)

Q. A couple of hours?

A. Perhaps a couple of hours, perhaps not that long. He used my dog and sled to haul the provisions over with.

Q. You are absolutely positive that it was a week after Mr. Taylor was down there the first time before this original lease was signed?

A. He was there the 3d and I am quite positive we signed that paper, the original, on the 9th. Whether he was there between that time I could not state.

Q. Are you positive this original lease was signed on the 9th, was it not signed on the 8th?

A. No, sir, it was signed on the 9th.

Q. Now, Mrs. Kuzek, along about the 3d day of April this paper which I now hold in my hand, this exhibit No. 2, was drawn up by Mr. Elliott?

A. Yes, sir.

Q. Now, after it was drawn up, it was also carefully compared with the original, was it not? A. Yes.

Q. Who compared it? A. This?

Q. Yes, with the original?

A. Mr. Elliott laid the original down on the table and put this on top of it and wrote out, just followed the same as this—

Q. What I want to ask you, who did the comparing after they were written?

A. After the two copies were written?

Q. After that one was written?

(Testimony of Mrs. Bertha Kuzek.)

A. Mr. Kuzek held the original and the pencil copy lay on the table.

Q. Who held that one there?

A. Mr. Elliott was reading this one.

Q. That was when?

A. On the 4th of April, I should say.

Q. On the 4th of April? A. Yes, sir.

Q. Were they read over more than once and compared at that time before they were signed?

A. Mr. Elliott read that over and then he handed both the papers—

Q. After he read it over, did Mr. Kuzek say they were alike? A. Yes.

Q. The same as he did when the first two papers were compared? A. Yes.

Q. Now, after Mr. Elliott had read it over and your husband had held the original, and then after that and after your husband had said it was all right, did you then compare it?

A. I read this one; I read this aloud.

Q. You read that aloud?

A. Yes, and Mr. Kuzek—

Q. Mr. Kuzek had what one?

A. He had the original one, the penciled one was on the table.

Q. Did anyone compare the pencil one with either of these at that time?

A. No, it was lying on the table.

(Testimony of Mrs. Bertha Kuzek.)

Q. This is your signature here, Mrs. Kuzek?

A. Yes, sir.

Q. Look at that paper and state whether or not that is not the affidavit you filed and signed in this case?

A. Yes, sir.

Mr. BRUNER.—Read it over.

Mr. ORTON.—We are going to read it over.

Mr. BRUNER.—I mean for her to read it.

Mr. ORTON.—Certainly.

(Witness examines paper.)

Q. I will ask you if you didn't sign the affidavit, part of which is to this effect?

A. I don't quite understand anything that you ask me.

Q. "We ask Mr. Elliott to at once make up our copy of the lease. Mr. Elliott said he would do so, and got the original lease and sat down and from it made the copy?" A. It contains that.

Q. You remember that—"After making the copy, my husband and I and Mr. Elliott compared it with the original lease."

A. I was there at the time we compared it, sitting right in the cabin when he made it out.

Q. "And also with the penciled lease to see if all of them were the same?"

A. The penciled lease was laying right between Mr.

(Testimony of Mrs. Bertha Kuzek.)

Kuzek and Elliott on the table; I say it was right there between them.

Q. You say here that you compared them and they were all the same? A. They were all the same.

Q. I will ask you to look at the first lease—you are absolutely certain about that, are you, that they are all the same?

A. Supposed to be, on the same blanks.

Q. Were they all the same?

A. They were supposed to be all the same, that is what I said, supposed to be all the same.

Q. Your husband compared them and said they were the same after comparing them?

A. Said they were all right.

Q. He said they were alike?

A. Yes, supposed to be made alike.

Q. I will ask you to look at the first lease, "To have and to hold unto the said lessee for the period of 1903 year from date." Do you find that there?

A. No, I don't find it all.

Q. Turn to the first paragraph. First I will read it from here: "First to enter upon said mining claim and premises on or before the 15th day of November, A. D. 1903"? A. 10th of December.

Q. What do you find it there?

A. 10th of December.

Q. 10th of November, isn't it?

(Testimony of Mrs. Bertha Kuzek.)

A. This is December. It is the same down here where it is written with the pencil.

Q. That is absolutely the same? A. Yes.

Q. "The year ending June the 5th, 1904, also give them right to sluice what pay dirt they have in dumps until finished"? A. Excuse me, where?

Q. Right here: "The year ending June the 5th, 1904"?

A. Yes.

Q. Is that the same? A. Yes.

Q. Also is not this: "Also give them right to sluice what pay dire they have in dumps until finished." Do you find that?

A. "With privileges to sluice what dumps they have left."

Q. You find that they are a good deal different, don't you?

A. They mean the same. That is what Mr. Elliott was saying they meant the same.

Q. Didn't you testify a moment ago that they were exactly the same?

A. It meant the same; that is what I meant to say.

Q. Then you were mistaken when you said your husband compared them and found them all the same, because there is a good many words in there that are different?

A. Mr. Elliott had said they meant the same, the words meant the same; that they should mean the same in the penciled one as in the written one.

(Testimony of Mrs. Bertha Kuzek.)

Q. Didn't you say that after Mr. Elliott read over the original and your husband holding this in his hand, didn't your husband say they were the same?

A. It meant the same. Elliott had said to them there he had written some words different and that they meant the same.

Q. When did he say that and what time?

A. I don't understand the question just exactly.

Q. Are you positive Mr. Elliott wrote in the word "1903"?

A. Yes, sir, Mr. Kuzek never wrote nothing but the pen and ink.

Q. Are you positive that he wrote "1903"?

A. He wrote everything that is written in pencil.

Q. What did he say when he wrote that word?

A. He wrote the figures there.

Q. Did he repeat the wording of the written part as he wrote it? A. What?

Q. At the time he wrote "1903," did he repeat it?

A. He repeated that.

Q. He said "1903," nothing else?

A. He repeated the word.

Q. What word? A. The figures.

Q. Did he say anything else?

A. All he said was what he wrote there.

Q. When he said "1903," did he say anything else at that point?

A. Did he say anything else, no.

(Testimony of Mrs. Bertha Kuzek.)

Q. Didn't say anything? A. No.

Q. Then where did he jump to?

A. He wrote the words in lead pencil.

Q. He wrote the word "November." Did he say "November," when he wrote the word "November"?

A. No.

Q. He didn't? A. No.

Q. When he wrote the word "November," he didn't say anything at all?

A. I am not positive that he said the word—I know very well when he got down below—

A. I am not positive whether he said that over or not; I am not positive that he said it.

Q. After he wrote the word—the figure "1903," he jumped down to the next word "November"?

A. He was writing the figures out.

Q. Then he jumped to the word "November"?

A. Yes, he wrote that down.

Q. Up above did he not at that time scratch out the words "day of" and write that "4" after "190"?

A. I don't know from that, it is very dim.

Q. After looking at it with the glass, after he wrote the figure "1903,'" did he scratch out "day of" and write "4"? A. He wrote "4."

Q. Did he say anything at that time?

A. I could not say positively.

Q. After that did he skip to the word "November"?

A. I think he did.

(Testimony of Mrs. Bertha Kuzek.)

Q. How about this "15" before that, didn't he write that first?

A. I couldn't positively swear to that.

Q. You don't remember him writing in the 15?

A. I couldn't swear to it.

Q. You remember him writing the November?

A. He wrote that, that is his writing.

Q. Do you see the word "of"? Do you know whether he wrote that in there?

A. I couldn't swear positive?

Q. Did he write the "3" right after the "0"?

A. He wrote that.

Q. Did he say anything about at that time?

A. I couldn't answer it.

Q. Could you say whether he scratched out the words in the line where there is written the word "M-c." 8"? A. He wrote that at that time.

Q. Did he say anything when he wrote that?

A. I think he did.

Q. What did he say?

A. I couldn't say, he wrote "M-c-.8"—

Q. He didn't continue reading this matter?

A. I could not say.

Q. Then he scratched out the words "least shifts of men," didn't he? A. Yes.

Q. Did he read over the third paragraph?

A. No, he didn't.

Q. He didn't read that at all?

(Testimony of Mrs. Bertha Kuzek.)

A. No; he read "to pay to said lessor or"; then he wrote this, "legal representatives or assigns 75 per cent—"

Q. When he got down to the word "fourth," then he began to read it out loud?

A. I am positive he read that out loud as he was writing.

Q. As he was writing it? When he got this written part finished, then he stopped reading the printed part?

A. There is no writing except this little place right here.

Q. Did he read any more of the printed part after he had written these three or four lines in writing?

A. No, he didn't—it is his writing.

Q. Did he read any of this printing?

A. No, he didn't.

Q. So the only portion of the printed lease that was read out loud was the fourth paragraph?

A. Yes, sir.

Q. Didn't you testify in your direct examination that he read out a good part of the printed part when he was writing it?

A. I said that he read that part there as he put it down.

Q. Isn't it a fact that you testified in your direct examination that when Mr. Elliott was writing in these

(Testimony of Mrs. Bertha Kuzek.)

different parts of the lease, that he read over a large portion of the printed part out loud?

A. If I did, it was because I didn't understand the question.

Q. Now, after Mr. Magaha signed that paper, which you hold in your hand, Exhibit No. 2, he gave it to your husband? A. This one given to my husband.

Q. And that has been entirely in your husband's possession ever since?

A. Except when it came here to court.

Q. You are positive about that?

A. Yes, sir; positive, except I took it to the recorder's office to get it recorded; it has been in his possession ever since then.

Q. Then it was not in his possession all the time?

A. I did take it to the recorder's office to record it.

Q. I will show you your affidavit as follows: "The next day Mr. Magaha came in and just after dinner my husband asked Mr. Magaha to sign the paper, and Mr Magaha took it up and read it over carefully and said it was all right and signed it. This paper had been the possession of my husband ever since."

A. Yes, sir.

Q. That is in your affidavit? A. Yes, sir.

Q. You had it in your possession very shortly after that?

A. He told me to take it down and have it recorded after that, and I took another down, some water right

(Testimony of Mrs. Bertha Kuzek.)

or something, and he told me to take it down and record it, and I got it and gave it to him again.

Q. Who went after it A. I went after it.

Q. Then what did you do with it?

A. I handed it to Mr. Kuzek?

Q. You say in your affidavit, "Affiant further states that she was present at the time her husband and Mr. Elliott prepared to make out a lease on the property; this was along about the 8th or 9th of March, 1904." you now have said it was the 9th, haven't you?

A. It was on the 9th.

Q. "At that time her husband desired that all parties should go to town and have a lawyer draw up the lease, but that Mr. Elliott stated that he had some blank lay and that he could make out the lease as well as anybody; and thereupon affiant's husband got the blank lay papers, which Mr. Elliott had previously given to him and sat down and commenced to write; after writing a few words Mr. Elliott said that he could write the lease probably better than affiant's husband; but he took a lead pencil and filled out the blank lease, which was to be used as a paper to copy from and from which the original lease was to be made out. The said pencil copy is now in my presence and it contains the following language: "4th. To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim." You remember that part of your affidavit?

A. I think I do.

(Testimony of Mrs. Bertha Kuzek.)

Q. Take the fourth paragraph and see whether or not it contains that language—read it and say whether or not this contained in the affidavit is true: "The said pencil copy is now in my presence and it contains the following language: 4th. To pay to said lessor or his legal representatives or assigns, 75 per cent of the gross output of said claim." Do you see that there?

A. I see that there, yes, sir.

Q. "After the pencil lease had been written out, and the terms agreed upon, the penciled lease was used by Mr. Elliott from which to copy and he thereupon wrote out in ink the original lease. In the original lease the words were written: "4th. To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim." After the original lease was written out by said Elliott, Elliott read said lease entirely through to my husband, my husband holding the penciled lease to see that it was a correct copy," of the original one? A. Yes.

Q. "The written lease was then handed over to me and I looked it over, and it being satisfactory, Mr. Kuzek signed it and Mr. Elliott signed it, and then Mr. Magaha signed it, and I signed it as a witness." What was done with the paper immediately after that?

A. I think Mr. Kuzek handed it to Mr. Elliott; I am not positive, but I think he did.

Q. Before or after it was signed?

A. After it was all signed, everybody had signed it,

(Testimony of Mrs. Bertha Kuzek.)

Mr. Kuzek wanted him to make out a copy of that other paper.

Q. What time of the day was that?

A. I should judge it was the 4th of March—you mean the 4th of March?

Q. Yes, the 4th of March. A. In the afternoon.

Q. About what time?

A. About two o'clock, after dinner.

Q. About what time was it that you got through?

A. With the writing?

Q. Yes, and signed it?

A. Well, I suppose it was—Mr. Elliott called his attention to it, he says, "It is now two o'clock."

Q. Was it two o'clock?

A. I think it was; I would not positively state it was two or when it was.

Q. He said, "It is now two o'clock"?

A. Yes.

Q. What else did he say?

A. That he wanted to meet somebody in town, and that he would make the paper out the next day.

Q. Then what happened then?

A. Mr. Elliott left.

Q. What happened right then before Elliott left?

A. He took the paper—the original—and I think put it in his pocket; he put it some place; I don't know where he put it.

Q. And then what did he do?

(Testimony of Mrs. Bertha Kuzek.)

A. They went to town then, wanted to go for some purpose—on the 9th of March I should say; I said the 4th, I meant the 9th of March.

Q. What did they do—started right off to town right away?

A. I can't swear to that; I didn't follow them up; I am sure they said they wanted to see a party in town.

Q. How long did they stay there, after the lease was signed before they left?

A. They went out of the cabin, I can't tell where to.

Q. That was when?

A. On the 9th of March.

Q. That was after two o'clock in the afternoon?

A. They were around there, somewhere around two o'clock.

Q. Who produced these blank leases?

A. If I am not mistaken, Mr. Kuzek had some blank papers; I think he said he had two in December that Mr. Elliott had given to him—I couldn't possibly state—

Q. Didn't you state in your affidavit this—when was that ink part written in that paper?

A. Sometime in December.

Q. In December?

A. That is what it says here,

Q. When was it actually written?

A. That part Mr. Kuzek wrote, he said he wrote it in December, I was not present when he wrote it—this part here was written on the 9th of March.

Q. When was the ink part written, if you know?

(Testimony of Mrs. Bertha Kuzek.)

A. I can't positively state.

Q. Did you see it written at all? A. No, I didn't.

Q. It was written when the paper was produced—at whose instigation was the papers produced?

A. Mr. Kuzek got these two blanks—got them sometime in December, he got them sometime.

Mr. BRUNER.—She misunderstood your question.

Q. On the 9th day of March at whose instigation were the blanks produced?

A. What do you mean by "instigation"?

Q. Who suggested it first?

A. Mr. Kuzek went and got the papers from the little box.

Q. I want to know who suggested that he should get them and bring them out?

A. The boys wanted to go to town; they came over to get the lay, and my husband went and got the penciled lease, which he had—he got the penciled lease, what my husband had already written out sometime in December, and Elliott wrote in this in pencil himself.

A. Elliott.

Q. Who got the blanks?

A. I think Mr. Kuzek got them; I would not be positive about it; I think Kuzek got them out.

Q. How many were there?

A. There was three that were wrote; I think Mr. Kuzek had more there at the cabin there.

Q. Isn't it a fact that Mr. Elliott stated at that time

(Testimony of Mrs. Bertha Kuzek.)

that he had some blank leases and that he would get them?

A. He brought some over in December; he brought some over before it was written off—I couldn't say. I think he did say something, I am not positive; I think he did say.

Q. As soon as Mr. Elliott said that he had got some blanks, and would get them, your husband went and got his blanks?

A. I think there was something to that effect; I would not say for sure; I didn't read everything that was said in the affidavit.

Q. Are you positive that one of these three blanks that were there, Mr. Kuzek had there in December, had writing on it?

A. Yes, the one in pencil was written out sometime in December. I think Elliott did say something about having the blanks—

Q. Now, I would like to have you show me in this penciled copy what part of it was written in December?

A. I think Mr. Kuzek made it out; whether he wrote it in December or not, I don't know; I was not present; I could not say whether it was on the 9th of March and dated it back, I could not swear to that.

Q. State what part of that was written when the blank was produced.

A. I didn't see him make it out; I don't know. I think the penciled part was made out then. I think it was written in December; I was not there.

(Testimony of Mrs. Bertha Kuzek.)

Q. Was the part that is written in ink already in there when it was produced that day?

A. Yes, it was, I think it was.

Q. All of it?

A. I am not positive; I think it was.

Q. You think it was all there?

A. I am not positive.

Q. Did your husband write anything in ink that day?

A. He might have; I could not say.

Q. You were there, weren't you?

A. He took the pen and was going to write, and Mr. Elliott said—he took the pencil and was going to write, he says, "I can write that better than Mr. Kuzek can."

Q. Your husband took the pencil?

A. I could not say whether he took the pencil or pen and ink, I could not say what it was.

Q. What part did your husband write on that day?

A. I could not say.

Q. Did he write anything that day?

A. He took the pen and was going to; I could not say whether he wrote anything or not.

Q. Is it not a fact that your husband did start and write a few words on the paper first?

A. He had written something there, he took the paper and sat down—he might have.

Q. Have you got any recollection about that matter at all as to whether he did or not?

A. I could not say whether he did or didn't; I think he didn't; if he did, he didn't write with a lead pencil.

(Testimony of Mrs. Bertha Kuzek.)

Q. What makes you so certain that if he did he didn't write with a lead pencil?

A. I can't say whether he wrote anything or not; he said something about writing a few words.

Q. You don't know whether he wrote anything or not, but if he did, he didn't write with a lead pencil?

A. No, there is no pencil writing written in by him.

Q. How do you know? A. I didn't see him.

Q. You don't know but what he wrote some that day?

A. He might.

Q. He might have written some, but if he did, you didn't know it? A. Yes.

Q. How do you know he didn't write with a pencil?

A. He didn't have the pencil in his hand.

Q. Did he have the pen in his hand?

A. I could not swear whether he did or not; the pen and ink was on the table.

Q. If you don't know whether he had the pen or not, how do you know whether he had the pencil?

A. I could not swear to it.

Q. He might have had the pencil?

A. I know pretty near his handwriting anyway.

Q. He might have had the pencil in his hand?

A. He might.

Q. He might have written a few words with the pencil; isn't that a fact? A. I don't see them.

Q. Then you are positive that he did not?

A. I don't think he did.

(Testimony of Mrs. Bertha Kuzek.)

Q. You don't think he did—that is as far as you can go?

Q. I will show you your affidavit where it says: "And thereupon affiant's husband got the blank lay papers, which Mr. Elliott had previously given to him and sat down and commenced t write." That is in your affidavit, isn't it? A. He might have.

Q. When you made this affidavit, you swore that he commenced to write?

A. I was not sure that he did not write.

Q. "After writing a few words, Mr. Elliott said that he could write the lease probably better than affiant's husband." Did you testify to that in your affidavit?

A. I think I did.

Q. So it is a fact that your husband did write a few words?

A. I didn't know that he did or did not.

Q. After refreshing your memory from this affidavit, you now remember that he did write a few words, isn't that a fact? A. I don't know.

Q. Did he or did he not?

A. I suppose he did.

Q. Do you remember whether he did or did not at the present time?

A. I knew he was going to write a few words, he might or he might not.

Q. Do you remember whether he did?

A. I could not say positively.

(Testimony of Mrs. Bertha Kuzek.)

Q. How did you happen to put in your affidavit, then, this statement: "And thereupon affiant's husband got the blank lay, papers which Mr. Elliott had previously given to him, and sat down and commenced to write." How did you happen to put that statement in there?

A. He had the paper there on the table, and writing, and Mr. Elliott said he could write better than he.

Q. He had the paper and was writing?

A. He was writing.

Q. He was writing? A. He was writing.

Q. "After writing a few words, Mr. Elliott said that he could write the lease probably better than affiant's husband." Is that correct? A. Yes.

And thereupon an adjournment was taken until 9:30 A. M., July 15th, 1904.

9:30 A. M., July 15th, 1904.

All present.

BERTHA KUZEK on the witness-stand.

Mr. BRUNER.—We have the memorandum-book here now. Do you wish to examine her on it?

(Further cross-examination by Mr. McGinn.)

Q. Mrs. Kuzek, I believe you testified yesterday that you remember that this lease was made out on the 9th day of March, 1904, for the reason that that day and that night Mr. Kuzek worked for Mr. Magaha and Elliott? A. Yes, sir, on the 9th of March.

(Testimony of Mrs. Bertha Kuzek.)

Q. And that you made a memorandum of the fact and that Mr. Kuzek did work the day and night of the 9th for them? A. I made a memorandum—

Q. Was not that testimony yesterday?

A. If I said anything about a memorandum, something like that.

Q. That is what you testified to yesterday, that you made a memorandum in your book to the effect that Mr. Kuzek had worked for them that day and night?

A. I made a memorandum, something to that effect; that is the reason I said on the 9th that he worked all night.

Q. Is this the memorandum that you had reference to when you were testifying yesterday?

A. Yes, sir, made out the lease.

Q. Can you show me anywhere in that memorandum-book anything that shows that Mr. Kuzek worked for Mr. Elliott and Magaha upon the 9th day of Marsh?

A. Only that I can say that he worked—.

Q. Can you show me anything in that book?

A. No, I can't show you anything—.

Q. Now, what you have in that book is that the lease was made out on the 9th of March?

A. It was written either the day after or the next morning.

Q. Why didn't you testify to that yesterday?

A. I could not think of everything at once.

Q. You couldn't think of everything?

(Testimony of Mrs. Bertha Kuzek.)

A. On yesterday I testified that the memorandum was that he went to work for them.

Q. You said that you put down in your memorandum-book that he worked for them the night of the 9th of March?

A. I can't say whether I did say that. I put down that he worked—I put down the 9th of March that the instrument was made out.

Q. Did you write that the same day the lease was made out?

A. I wrote that the next day or the next morning or the next afternoon, I didn't know which—it was on the 9th of March.

Q. What you wrote is, "made out lease on 9th of March." A. Yes.

Q. That is your own handwriting?

A. Yes, that is my own handwriting.

Q. Why is it that you wrote that so far back in the book?

A. Because other things were written in this part of the book for 1901.

(Book marked "Defendant's Exhibit No. 3" and introduced in evidence.)

Q. You are sure you wrote that in the book the day after the lease was made out?

A. The day after somewhere—

Q. Why did you write it there?

A. I wrote other things in there.

(Testimony of Mrs. Bertha Kuzek.)

Q. Have you any other reason that you wrote in there to fix the fact that the lease was made out on that day?

A. If I have any other reason?

Q. Yes.

A. If I had, I don't know whether I put it down or not.

Q. You don't know whether you had any other reason or not? A. Only as I stated before.

Q. What was that?

A. That I put it down. That on the 9th on account of Kuzek working that night and afternoon—of course, I didn't put it down on the paper in this memorandum, but I asked Elliott to get the "Nugget" for me that night.

Q. You put this memorandum of the fact that the lease was made out on the 9th day of March down so that you would know that was the night Mr. Kuzek worked for them, Elliott and Magaha?

A. Something to that effect.

Q. If he wanted to keep a memorandum of that fact, why didn't you put that in your memorandum book?

A. I could not write everything.

Q. Why didn't you just say that Kuzek worked for Magaha and Elliott the night of March the 9th?

A. I couldn't write everything.

Q. Don't you think that would have refreshed your memory better than to write that the lease was made out March the 9th? A. It might and it might not.

Q. Is this all in your handwriting?

(Testimony of Mrs. Bertha Kuzek.)

A. Some of it is mine and some of it is Mr. Kuzek's and some somebody else.

Q. Whose handwriting is that?

A. Some of this is Kuzek's writing. He sometimes spells his words wrong and I wrote over his writing; some of them are his figures. This is my writing—this is my writing. I corrected some of his—I corrected some of this.

Q. Are the figures all in his handwriting?

A. I could not swear that they are all his figures.

Q. Are they yours? Will you please point out yours?

A. Some are mine; I would not say positively.

Q. How about that "75" right there; on this page "April 5, 1901" at the top. Whose figures are those?

A. I wrote that.

Q. Right here, I mean. Whose figures are these?

A. I could not say positively whose figures these are.

Q. Are they yours or Kuzek's?

A. I couldn't answer.

Q. Can't you positively answer whether that is your handwriting? A. I could not say positively.

Q. Whose "5" is this at the top in "150"?

A. I could not say whether that is Kuzek's for sure. It looks as though it might be mine. I would not positively say that. I would not say whether that 100 is mine. I could not say; it looks like mine.

Q. Look at this "75," where it says "1 sack coal—75"; whose handwriting are those?

(Testimony of Mrs. Bertha Kuzek.)

A. I could not say; it is mine or Kuzek's or somebody else's.

Q. This is your memorandum-book?

A. There is something that I don't know anything about, the first part, who wrote that whatsoever.

Q. You know who wrote this in the book "April 5, 1901"; that is either in your writing or Kuzek's?

A. That is mine—I could not say whether that is his or mine.

Q. Either one of the two?

A. I could not say whether it is his or mine.

Q. I show you again the account on page which is marked "April 5, 1901," state what that account is?

A. Yes.

Q. Is that the account that was kept either by you or Stanley Kuzek?

A. It is somethings wrote down; I couldn't say now what it is; it is plenty long time ago and I can't remember just exactly what it is.

(Question read.)

A. Yes, sir.

Q. Didn't you testify a few minutes ago that this writing is what you had written over his?

A. He couldn't spell some words, he spells wrong; I know that I had written this.

Q. You wrote that there (indicating)?

A. Yes, I wrote that.

Q. That was an account that you kept?

A. That I wrote down; I can see it is written there.

(Testimony of Mrs. Bertha Kuzek.)

Q. You knew what you were doing when you wrote it? A. I wrote part and he wrote part of it.

Q. The two of you wrote it? A. Yes.

Q. There is nothing there but what was written by one or the other? A. I could not swear to that.

Q. Did you write that word "sacks"?

A. I wrote the balance.

Q. Who wrote the balance?

A. I think Kuzek wrote a part.

Q. Did you write these figures, you or Kuzek?

A. I couldn't say.

Q. Is there anybody else's writing there?

A. There are other things in here that I wrote—that I couldn't say.

Q. Did anybody else keep any accounts in here?

A. I couldn't say; they might have kept some accounts there.

Q. You wrote over it?

A. I might have written this or this, I couldn't say.

Q. You added it up?

A. I couldn't say that I added it up.

Q. You know you wrote the "sacks," part of this. Did somebody else put the figures in?

A. I suppose so.

Q. Who did add it up? A. I couldn't say.

Q. You don't know very much about this page?

A. Not so very much.

Q. You wrote a good deal of it yourself?

A. I wrote what is written along here (indicating).

(Testimony of Mrs. Bertha Kuzek.)

Q. Why did you say Mr. Kuzek wrote it if you don't know anything about it?

A. I didn't know anything about it. I knew the word was spelled wrong.

Q. You were anxious to have all the words spelt right in this private account?

A. I wasn't particular about it.

Q. You have gone over eight or nine or ten of the words, haven't you? A. I wrote over them.

Q. Who wrote what was there before?

A. I suppose Kuzek wrote some words here. Whether he wrote the figures or not I would not say. He must have written some; I couldn't say.

Q. He wrote some of the words. You don't know whether he wrote some of the figures?

A. I don't.

Q. You think somebody else got the book and wrote some of the figures there?

A. There might be such a thing.

Q. I show you another page which is marked at the top, on the second line of it is "1 rolled oats." Whose writing is that? A. This here is mine.

Q. What is the first line?

A. I don't know what that is.

Q. The first line you don't know anything about, the second line you wrote? A. Yes.

Q. If you don't know anything about what is on the first line, how did you happen to write the second and then have it added up?

(Testimony of Mrs. Bertha Kuzek.)

A. Where is it added up, this here?

Q. Yes.

A. I don't know what that is.

Q. Do you know what that page is?

A. Items of something.

Q. Items of what? A. Provisions.

Q. Who wrote it—did you write all of it or not?

A. I wrote some things.

Q. Point out what parts you wrote?

A. I don't know whether I wrote that or not; I hardly think I did write this.

Q. The second line you wrote? A. Yes.

Q. Did you write the balance of it?

A. No, I don't think I did.

Q. You just wrote one line on that page?

A. I believe I wrote that.

Q. Pointing to the third line at the bottom—who wrote the balance of it?

The COURT.—Did you write that?

A. No, I didn't.

Q. Who wrote the balance of it, Mrs. Kuzek?

A. It looks sort of looks like Kuzek's writing, this part here.

Q. Confine yourself to that page; do you know who wrote the balance of it except that one word?

A. Kuzek wrote this. I am not certain that he wrote that.

Q. Did he write it?

(Testimony of Mrs. Bertha Kuzek.)

A. I can't say; it is kind of mixed up there; I can't say whether he wrote it or I wrote it.

Q. Did anybody else have any knowledge about this account to write this?

A. I couldn't say the book has been in the cabin; several people has been in there.

Q. Do you think anybody else has been writing anything in there or not?

A. If I am not mistaken, I wrote that (indicating).

Q. You think if you are not mistaken you wrote the "5"? A. Just part of it.

Q. Not the figure but some of the letters?

A. I am not sure but what I wrote the figures or not.

Q. You are not so sure—what is that, 48 or 78?

A. 48—I am not sure, I think that is part of my writing.

Q. What is that? Do you think that is your writing?

A. I can read that, "1 tomatoes."

Q. Did you write the figures after that?

A. No.

Q. Just the written part? A. No.

The COURT.—Did you put any of the figures down there? A. I am not positive.

Q. These are the only figures that you think you might have put down. These are the only figures on that page that you put there except the 48?

A. I couldn't say whether I put that down or not. I hardly think I did; I am not positive of that either.

(Testimony of Mrs. Bertha Kuzek.)

Q. You only put the "48" down and you are not positive of that? A. I am not positive; no.

Q. Now, what was on this page that you have torn out immediately prior to "Nome, June 13th, 1901"?

A. I don't know.

Q. Wasn't it just torn out yesterday?

A. I don't know.

Q. Do you know when it was torn out?

A. No, I don't know anything about it. If it was done I didn't know it.

Q. If it was done, you didn't know it?

A. No, sir.

Q. I show you again the figures on page of "April 5, 1901" at the top, and the figures 1 "sack coal 75."

Mr. BRUNER.—Objected to on the ground that it has already been gone over.

Q. "1 sack coal 75"; did Kuzek write that?

A. He might.

Q. I will ask you if you know who wrote it?

A. I am not positive; he might have wrote that.

Q. Did you write it?

A. No, I didn't write that; I wrote some of that; I didn't write that.

Q. Confine yourself to the figures "75—1 sack coal"; did you write that? A. I did not.

Q. Did Mr. Kusek write that?

A. He might have.

Q. You didn't see him write it? A. No.

(Testimony of Mrs. Bertha Kuzek.)

Q. Don't you know his handwriting?

A. It is mixed up.

Q. The "75" isn't mixed up?

A. He might have wrote it.

Q. That is the best you can say?

A. He might have wrote it.

Q. Did you ever see Mr. Elliott's handwriting except in these leases? A. No, I can't say I did.

STANLEY KUZEK, called in rebuttal, testified as follows:

I am the plaintiff in this action, and am the husband of Mrs. Kuzek who has just left the witness-stand. I have known Charles F. Magaha about a year and Mr. Elliott since last fall. I am the owner of Marion Bench Claim No. 2. I let a lay to Mr. Magaha and Elliott, of the Marion Bench Claim, which was reduced to writing on the 9th of March, 1904. Mr. Elliott wrote it in the presence of Mr. Magaha, Mrs. Kuzek and myself, in my cabin on the Marion Bench Claim. I wrote part of this paper in ink. I wrote "5" 2 December" and "3" in 1903, "Stanley Kuzek, Nome, Cape Nome, Marion Claim." I didn't spell this right "J. P. Currie 12 July 1899—1—0—August—1899—87—XVI—Nome"; that is all I wrote in this. I wrote this if I remember right, that evening when I got those blanks. When Mr. Magaha brought some lumber up the first time to put up the cabin, I sent down and bought the blanks, and when I was alone in the evening, I started to draw them up, but I thought I

(Testimony of Stanley Kuzek.)

could not make them out as well as they ought to be, and I just put the recording dates and things there and then I put them in an envelope and thought I would leave them until some other time; all that I have just been reading I wrote in there that time, and I think that was on the 5th of December.

Q. You state that you all met together on the 9th of March. Now state exactly what took place at that time?

A. At that time Mr. Elliott and Magaha came to my cabin—it was shortly after dinner and I wanted to get my paper. I asked him if I should go with them to town to draw up the paper and they said it was necessary—"we will draw it up ourselves." I says, "You can draw it up; I started it up and didn't make it complete"; and Mr. Elliott says, "I can make out the paper." I says, "All right." I had the paper in my house; I sat down to begin—Mr. Elliott sat down alongside of me; I passed him this paper, he looked at it, and so we decided to draw up the draft with a pencil. So he did draw up the draft with the pencil and then took another clean blank and wrote out the paper with a pen and ink. After he did write it out then he says, "I have to change the line about sluicing," but he says: "It is the same meaning, anyhow." I looked that up, I says, "I didn't think that makes much difference." He says: "I just shortened it up." The he read the paper over and handed it to me. I looked over it. He read it aloud and then he handed it to me, and I

(Testimony of Stanley Kuzek.)

looked the paper over and handed it to my wife, and she read it and I held this paper in my hand to see that it all compared. It seems it all compared pretty well except this part, changed about sluicing the dump, and I thought that didn't have any effect in the paper. Then I signed, Mr. Magaha signed and Mr. Elliott signed, and I asked if I should call some of the other men to sign as a witness, and they said, "Mrs. Kuzek can sign as a witness." I said, "That is all right; that is satisfactory"; and so she signed as a witness. Then I handed him the three blanks and asked him to draw up a copy for me, as is usually drawn up, a duplicate, and Mr. Elliott looked at the clock and he says, "I don't think I have that much time to spare; I will draw up the paper to-morrow for you." I says, "That is all right —that is satisfactory"; and he says, "We have to meet some parties in town shortly after noon." I says, "That will be all right." They hired me to take off the boiler for them while they went to town; they went to town and I took care of the boiler for them that afternoon and that night till morning. They took the paper with them and I kept the pencil draft. When I asked Mr. Elliott to draw up the copy for me he says, "You keep this memorandum; I will draw up the copy to-morrow." He did not draw up the copy until about the 4th of April.

Plaintiff's Exhibit No. 2, the duplicate, was drawn up in my cabin by Mr. Elliott; Mr. Elliott, Mrs. Kuzek

(Testimony of Stanley Kuzek.)

and myself being present. Mr. Elliott came to the cabin, sat down, and pulled the paper out of his coat pocket, and I brought the blanks for him and he spread out his paper and filled up the blank according to his paper; after he had finished he read it over, and when he was through reading he passed both papers to me and he says, "You look over it; they are both right." I compared them and looked over them to see that the two were alike. I handed the second one—we call the duplicate—to Mrs. Kuzek, and I held the original while she was reading it over; when she was through she passed it over to me and I signed it, and Mr. Elliott signed, and I suggested that I go out and get Mr. Magaha from the boiler-room and get him to sign; and Mr. Elliott says, "It don't make any difference; he might be busy; he can sign it to-morrow morning." I says, "All right," and Mrs. Kuzek signed as a witness, and that was all that was done that evening. Mr. Magaha signed the next day, shortly after dinner; to my best recollection and rememberance he read it to himself; I then put the duplicate away with other papers in my box. In about a week or so I sent it to town by Mrs. Kuzek and she placed it on record; I also kept the pencil memorandum. Mr. Elliott took the original along with him as before. I first heard of the loss of the original paper on the 23d of May. It was in the counting-room of the Alaska Banking and Safe Deposit Company, in the town of Nome; Mr. Cowden, Mr. Elliott, Mr. Magaha and myself being present. I showed the duplicate to Mr.

(Testimony of Stanley Kuzek.)

Cowden, and Mr. Cowden said I was to have 25 per cent according to the terms of the duplicate lease.

Q. In paragraph IV of the original lease, what figures or letters were inserted in line one of said paragraph after the words "or assigns"?

A. After the words "or assigns" was the figure "75."

Q. Are you or are you not able to state that that is an exact copy of the original lease?

Mr. ORTON.—Objected to as not a proper question; it is for the Court to say whether it is or not.

The COURT.—Objection overruled.

A. It is the same; when Mr. Elliott filled up the duplicate and passed both papers to me, he says, "Look over them; they are both alike."

Cross-examination.

(By Mr. ORTON.)

Q. Mr. Kuzek, I show you the document here which is marked Plaintiff's Exhibit No. 3, which has been identified as the draft of lease; you are familiar with this?

A. Yes, sir.

Q. Now, when did you write that part of it which is written in ink?

A. I wrote that about the 5th of December.

Q. All of it? A. All of it in December.

Q. All of it was written in December and about the 5th of December? A. Yes, sir.

Q. You are absolutely positive about that, are you?

A. Yes, sir, I am very much so.

(Testimony of Stanley Kuzek.)

Q. That you wrote it on or about the 5th of December? A. Yes, sir.

Q. When you produced it on the day that the original lease was drawn up it had written in it just the writing that is in ink on it? A. Yes, sir.

Q. That is a fact, is it not?

A. Yes, that is a fact.

Q. You started in, did you not, and wrote a little more yourself?

A. I sat down and opened the ink bottle. I pulled the cork out and dipped the pen in, and there was more paper on the table, and I tried the ink or the pen, whatever you might call it, and then Mr. Elliott took it and he said he was going to write this over anyway, and he filled it out with a pencil.

Q. I will ask you if that is your signature, Mr. Kuzek? A. Yes, sir.

Q. You remember signing that affidavit?

A. Yes, sir.

Q. You read it over before you signed it?

A. Yes, sir, must have.

Q. I call your attention to this part of it, "Affiant further states that the defendant Elliott had a number of blank mining claim leases down at the mine, and that when they concluded to enter into a lay he told the defendants that they had better take the blank leases and all go up town and get a lawyer to draw them up, but that Billy the Horse (Elliott) said 'No';

(Testimony of Stanley Kuzek.)

that they could fill out the blanks. Affiant then sat down and wrote a few words at the top of the lease."

A. There was writing at the top of the lease. I had reference to this here—what is written here.

Q. Didn't you testify in your affidavit, "Affiant then sat down and wrote a few words at the top of the lease"?

A. I testified with reference to this that I had wrote, to this—it wasn't written at the same day. I might say I wrote part of it.

Q. Then this is not true in your affidavit when you say—start here—"Affiant then sat down and wrote a few words at the top of the lease; then the defendant Elliott took the paper and wrote in lead pencil."

A. He did.

Q. That is not true that you wrote a few words on that day?

A. I don't know; I wrote a few words on another paper at the time this was filled out; that was my writing.

Q. Will you please explain how you happened to explain this in your affidavit, why you put this in your affidavit, if it is not so, the words "wrote a few words at the top of the lease"?

A. I might have been mistaken in my memory then. I didn't explain it, I know. I was worked up at that time, and my head wasn't clear, and I would not remember all other things.

(Testimony of Stanley Kuzek.)

Q. How did your attorneys happen to put that in there of you didn't tell them that?

A. Maybe the attorney will say the thing different from what I will tell it to him; you know that very well.

Q. This is not true in your affidavit then, "Affiant then sat down and wrote a few words at the top of the lease."

A. Not in this form; it is not true in this form; it is true the writing was at the top.

Q. It is not true that after writing a few words the "defendant Elliott took the paper and wrote in lead pencil, filling up most of the blank."

A. Not in this form; it is true he filled up part of the paper.

Q. I will ask you to state whether or not you wrote anything else on the paper at the time, exhibit 3?

A. No, sir.

Q. Did you write that "1903" right there?

A. That is a thing I would not swear; you can test me by my writing.

Q. You might have written these figures "1903"?

A. Mr. Elliott's handwriting is very similar to mine. You see he filled up this and I left it blank.

Q. Mr. Elliott's handwriting and yours are very similar? A. To a certain extent.

Q. State whether or not you wrote that "1903"?

A. That I don't remember; it looks very much like mine.

(Testimony of Stanley Kuzek.)

Q. It looks very much like that?

A. Yes, to a certain extent.

Q. You would not swear but what you wrote that "1903," will you?

A. I would not swear whether I did or not.

Q. So it is possible that you wrote some of the pencil words on that paper.

A. To my best memory, I don't remember that I wrote with the pencil.

Q. Now, the 1903 is written in pencil?

A. Yes, sir.

Q. You would not say that you didn't write that, will you?

A. That I could not swear to, whether I did or not.

Q. Look at the word "November" written on the second line of the first paragraph, and say whether it is not a fact that you wrote that word "November" there which is written in pencil?

A. I just stated that I don't remember that I used the pencil; of this I am positive. I intended to fill it out with ink, and I don't remember using the pencil on it. About this word you say "1903 and November," I don't remember using the pencil.

Q. Is not it quite possible that you wrote this word "November"—it is quite possible that you wrote that, is it not? Don't it look like your handwriting—isn't that "R" just the same as the "R" at the end of "December" up here?

(Testimony of Stanley Kuzek.)

A. My best recollection is I don't remember using the pencil on it.

Q. You might have used the pencil, might you not, on this, Mr. Kuzek?

A. No, I don't remember of using the pencil; I remember using ink.

Q. You might have written a few of these words in pencil? The 1903 you already said you might have written that. Isn't it a fact that you might have written the word "November"—it is quite possible you might have written the word "November"?

A. It might be possible.

Q. Yes; now we come down to the word—take the figure "15" between the words "the" and "day" in the first line of paragraph first, right there; isn't that your writing there? This "15," this "15" right here is the one I am talking about. A. I would not say.

Q. It looks like your writing, doesn't it—that "15"?

A. I had done no writing on that paper; it looks similar to no letters.

Q. It is quite possible that you wrote that "15" also, isn't it? A. I would not say that I did.

Q. Or that you didn't? You would not say that you didn't?

A. To the best of my memory—I remember I filled it up—the ink—whether I put any more with the pencil, I don't remember that.

Q. It is quite possible, however, that you did?

(Testimony of Stanley Kuzek.)

A. I don't think so.

Q. You stated that it is possible that you wrote this "1903"—it is quite possible that you wrote the "15"?

A. No, I don't think so.

Q. You think it is not possible that you wrote the "15"?

A. Not to my best memory—Mr. Elliott filled it out in pencil.

Q. You are not willing to swear positively that you didn't make the word "15"?

A. I would not swear either way for this matter what I don't positively know. My best memory is that I started out to fill up the paper with the ink, and he thought he could fill it out better, and he filled it out himself altogether.

Q. Come down to the word "legal" in the fourth paragraph; that looks like "h-e-s," did you write that?

A. No, sir.

Q. You are positive of that? A. Positive.

Q. You are absolutely positive about that?

A. Yes, sir.

Q. And this "75," did you write that?

A. No, sir.

Q. You are positive of that?

A. Positive, yes, sir.

Q. Don't that look like your handwriting, this "75"?

A. A good many writing there looks like mine; it is similar to it. I could show you some receipts—I could

(Testimony of Stanley Kuzek.)

produce you the man that will show you writing very much like that.

(Question read.)

A. It looks similar to it.

Q. I show you "75" in this book "April 5"; did you make that "75"—did you write this?

A. Let me see.

Q. Did you write this—that is your handwriting, isn't it? Go ahead and examine it.

A. All this writing—I see a few words—we have several of these note-books, which we bought with some outfits from different people, that there was things written in already. I couldn't swear whether that is mine or not; it is three years ago since that was written.

Q. Look at that account. Don't you remember that account in that book? A. I don't.

Q. You don't remember it at all? Look it over and see if you don't remember that account.

A. I couldn't tell you—I wouldn't be sure of this—

Q. Do you recognize anything on that page with "April 5, 1901," at the top? That is in your handwriting, isn't it?

A. I don't remember of these things—where it was—

(Question read.)

A. Yes, sir, I do.

Q. This line here which has "1 sack coal," the word "coal" there and the "75"; that is your handwriting, is it not?

(Testimony of Stanley Kuzek.)

A. That I could not tell whether it is my writing, this "75."

Q. The word "coal" is in your handwriting?

A. That I would not swear to as I never make this kind of an "s."

Q. That has been written over by your wife. She has testified to that. Isn't that a fact, that this word "sack" is not in your handwriting—that that has been written over? A. Yes, it has been written over.

Q. The word "coal" is in your handwriting?

A. No, I don't think it is. I never make a "c" that way. I never put my "C's" this way in the same shape as this. I start at the top.

Q. Do you testify that any of the figures are in your handwriting at all? A. Yes, sir.

Q. You said there is something on that page in your handwriting. Show where on that page in handwriting there is anything in your handwriting. Will you now please point it out to me? Please turn over here, the page that says "April 5, 1901," at the top?

A. That I could not tell because I see handwriting similar to that—because I fool myself easy. I am not expert in identifying handwriting.

Q. This is your book?

A. This book is one I seen before. We bought it with different outfits, and there had been some writing in it already. I could not tell whether it is all—I am positive it is not all my writing, either my wife or myself.

(Testimony of Stanley Kuzek.)

Q. You recognize that book—did you ever see that book before? A. Yes, sir.

Q. Did you ever write anything in that book at all?

A. I might; I possibly did.

Q. Find in there some place that you wrote something in that book, please.

A. That is my marking—that is my drawing.

Q. Yes, find some writing of yours. Are those your figures? A. I couldn't say.

Q. That is at the page with "5" at the time; those are not your figures?

A. No, sir; I wouldn't say that they are mine.

Q. Can you find any place in there—is there any writing of yours in that book at all.

A. This number is "9." I make a funny "9"; that is mine.

Q. That "9"—you made these words where it says something—"May, 1901"—you mean the day that you wrote that? A. No.

Q. You don't know?

A. This "9" looks similar to that; it is not my writing.

Q. Is the "1901" your writing?

A. No, it is not; no, sir.

Q. See if you can find anything else written in that book at all?

Q. I show you another page from this book which may be identified as having "1" something with the fig-

(Testimony of Stanley Kuzek.)

ure "23" on the top line, and I will ask you whether or not any of that page is in your handwriting?

A. It looks similar to my writing.

Q. This is your book, isn't it?

A. My wife has been keeping more or less this book in her possession; I don't remember.

Q. I call your attention to the words "3 hams," I think it is; isn't that your writing there?

A. I wouldn't swear that it is my writing.

Q. It is not your wife's writing?

A. No, I don't say it is her writing.

Q. Is it not a fact that you wrote that and can remember that? A. I am not positive.

Q. What is your best judgment—your best recollection?

A. I could not state that I wrote this because I have not had the book in my hands for so long a time I don't remember.

Q. Did you ever have this book at all?

A. I know it was brought from Seattle from Cooper & Levy?

Q. Did you ever see it before? A. I seen it.

Q. Did you ever write anything in that book?

A. I don't remember.

Q. You don't remember whether you did or not?

A. I don't.

Q. Did you keep any accounts there?

A. That I don't remember, as I told you first this

(Testimony of Stanley Kuzek.)

book came in my possession from somebody—somebody had it before.

Q. Can you tell your own handwriting when you see it?

A. I am not an expert. I have seen other handwriting that is identical with mine.

Q. Whose handwriting did you ever see that was identically the same as yours?

A. A fellow by the name of Howard; he was working for me; his figures would pass for mine just exactly.

Q. How about his writing?

A. And his writing pretty much, some little difference, especially capital letters; he used a different shape.

Q. You are not able, are you, to look in your own memorandum-book and state whether or not that was written by you?

A. That is not my own; of course it was in my house, Mrs. Kuzek sometimes used the memorandum. I don't remember whether I ever had anything to do with it or not.

Q. And you will not say whether this, "three hams—25," are not in your handwriting?

A. I would not swear to it.

Q. What is your best judgment?

A. I would not swear that is my handwriting, because I would not remember.

Q. Don't you know your handwriting after you see it?

(Testimony of Stanley Kuzek.)

A. There is some other handwriting that is similar to it I see.

Q. Does that look like your handwriting, that "three hams—25"? A. It looks similar.

Q. Looks just exactly like it?

Mr. BRUNER.—We will admit it is his handwriting for the purposes of this case.

Mr. ORTON.—The words "three hams 25"?

Mr. BRUNER.—"Three hams 25."

Mr. ORTON.—How about this other over here, "1 sack coal—75"? I could not make Mr. Kuzek testify that that was his writing. Mrs. Kuzek testified that she wrote it over the "sack."

Q. There is a question in regard to it. Is it yours, Mr. Kuzek?

A. I don't know; there is different handwritings in there; I couldn't tell.

Q. You would not write a page like that at one time and have it go altogether out of your mind?

A. Maybe—

Q. Is it or is it not?

A. That was three years ago in 1901.

Q. You don't remember that far back?

A. Not unless something unusual happened.

Q. Do you remember when your wife wrote that?

A. No, sir, I do not.

Q. You don't have any idea when she did it?

(Testimony of Stanley Kuzek.)

A. I don't know; I never went over the account with her.

Q. Do you know what used to be written at this point? A. No.

Q. I will ask you to look at this page "Nome, July 17th," which is written at the top, and say if you wrote that? A. No, sir.

Q. It reads as follows: "Nome, July 17th. Received from Mr. Kuzek the sum of $10.00 in full payment for two days' work." Signed by a man by the name of McNeil? A. It seems to be his handwriting.

Q. Is it his handwriting all the way through or not?

A. It seems to me; I could not tell now.

Q. You don't know whether it is his handwriting or yours? A. It is not my handwriting.

Q. What was written on the opposite page before it was erased? A. I don't know.

Q. You are not able to recognize your own handwriting. How are you able to state to us that the word immediately before "legal representatives" in exhibit 3 was not written by you, if you don't know your own handwriting?

A. Because I don't remember using the pencil on this instrument.

Q. You don't remember whether you did or not?

A. I remember writing with ink.

Q. You didn't write anything with ink, or if you did, you don't remember,and you don't remember whether you used the pencil or not; so how are you able to state

(Testimony of Stanley Kuzek.)

positively that you didn't write this word before "legal representatives," "his"—supposed to be "his"—whatever the word may be. Isn't it a fact that you make an "h" like that? A. It looks similar to it.

Q. It looks similar to your "h"? A. Yes.

Q. You always make an "h" just in that fashion?

A. Sometimes, not maybe. I write different on account of not writing for a long time—sometimes when I am not using a pencil or a pen for some time when I am working and have to write, I make a different letter than if I get used to writing.

Q. I will ask you to look at the "h" in this word "3 hams—25." That is admitted to have been written by you, and I ask you if that "h" isn't very much like the word that I just showed you? A. It looks similar.

Q. When you look at these two words here, this word "ham" and this word "his" or "h-e-s," and examine them, don't you think it very likely that you wrote this word "h-e-s"? Look at this "h" here and this one?

A. This "h" is different; it is rather more crooked this way; it is a little drawn down; it looks like this one.

Q. You are not able to state positively that you didn't write it? A. I could not state positively.

Q. You could not state positively that you didn't?

A. To my best knowledge, I stated that I didn't.

Q. You are not positive about it?

A. What do you mean?

(Testimony of Stanley Kuzek.)

Q. You are not positive that you didn't write that—you might have written that?

A. I am positive that I didn't.

Q. You are absolutely positive that you didn't?

A. What do you want to get at?

Q. Are you absolutely sure that you didn't write that word "h-e-s"?

A. That is my best memory; I never used the pencil on this paper.

Q. You admit that you might have written this 1903, that you admitted?

A. I told you it looks similar to my writing.

Q. You already told me that it was possible that you might have written it. Didn't you testify that this morning? A. I testified that it looked similar.

Q. Didn't you testify this morning that it was possible that you wrote that 1903?

A. When you asked me that time I allowed myself to repeat your word, it was my intention—

Q. Isn't it a fact that you testified this morning that it was possible that you might have written the penciled figures "1903" in that paper; didn't you testify to that this morning?

A. I told you to my best memory that I didn't use the pencil.

(Question read.)

A. Perhaps I did, because I was mixed up when you use so many terms; I repeated your words.

(Testimony of Stanley Kuzek.)

Q. At this time have you changed your mind and do you know that you didn't write that "1903"?

A. My best memory is I don't think I used the pencil on this paper.

Q. I want to know whether or not you know that you did write it or did not? A. I wrote this.

Q. I am asking you about this. Please confine your answer to this one. I am asking you if you are absolutely sure that you didn't write this 1903?

A. I don't think I did.

Q. Yes or no? A. No, sir.

Q. You are absolutely sure that you didn't write the word "h-e-s" immediately before "legal representatives"? A. No.

Q. You are not absolutely sure? Are you absolutely sure that you didn't write the figures "75" in the first line of paragraph fourth? A. No, sir.

Q. I will ask you if it is not a fact that the figure "75," being the last figure at the end of the first line of paragraph fourth of exhibit 3, looks exactly like the figure "75" after the word "coal" on the page of this memorandum-book, which has "April 5, 1901" written at the top? That "75" here and this "75" here, if they don't look exactly alike?

A. It looks by looking at it simply—it looks alike, but as I explained before, the "7" is drawn from the shoulder and there is a slant—more slantways; it is sort of cut off—it is sort of cut down, cramped, this way, and this is more longly drawn.

(Testimony of Stanley Kuzek.)

Q. You don't think they are alike?

A. If I look at them quick, yes.

Q. How about the "5's"? Don't they look alike?

A. The "5's"; let's see. No, sir, they are not.

Q. They don't look alike?

A. No, they are not; let's see if I can explain that. The "5" in the book is more rounded up on the bottom, and this here is about half drawn this way (indicating).

Q. You are looking at the wrong "5."

A. That is just the same; this has a very little turn and this here has quite a turn.

Q. Isn't it a fact that you always make a "7" by making three strokes by starting upward this way and this at the finish, making three strokes to the "7"?

A. I do sometimes.

Q. Don't you always make the stroke that way?

A. In making the "5"—

Q. And in making the "5," don't you always connect the tail right to the top of the letter? Don't you always do that?

A. I try to do the best I can; yes, sir.

Q. Isn't it a fact that you always write the figure "3" as it is written in the second line of the first paragraph of exhibit 3, after the "190"?

A. I would not say that I do.

Q. You would not say that you don't?

A. My memory is I don't.

Q. You are not sure that you don't?

(Testimony of Stanley Kuzek.)

A. I say that to my best memory; I think that is plain.

Q. You are not absolutely sure, are you?

A. No, I would not swear; I am not sure of anything except death.

Q. That is the only thing that you are sure of?

A. Yes, sir.

Q. You are sure that you wrote the ink part there?

A. Yes.

Q. Then that is one thing that you are absolutely sure of? A. Yes.

Q. So you are mistaken when you said that you are only sure of death?

A. Anything that I am not sure of; I would not say that, I am sure; I am sure that you will die.

Q. You are equally sure that you wrote this ink?

A. Yes, sir.

Q. Equally sure? A. Equally sure.

Q. Isn't it a fact also that you wrote the word "November" that is immediately before the letters "A. D." in this first paragraph?

A. No, sir; I don't remember that. I could not say that I did.

Q. After Mr. Elliott had written out this original lease, he read it out loud, did he? A. Yes, sir.

Q. And you held this draft or copy of it to see that they were alike? A. Yes, sir.

Q. You found them alike?

(Testimony of Stanley Kuzek.)

A. Yes, sir; except the few words at the last that Mr. Elliott said were different—a few words about sluicing the dumps.

Q. That was the only difference in the two?

A. There was nothing, sir; that would injure the paper.

Q. Take this draft. I will ask you to state if it isn't a fact in this one, it says "15 day of November," and here it says "10th day of December." How do you account for that discrepancy if they were alike? How do you account for that if you say they were alike?

A. That was the third paper when that was written.

Q. This third paper was exactly like the other one, was not it a copy, these two?

A. To tell the truth, the important part, as to about the percentage and the time of the lay, that was what I was watching most.

Q. Now, if you held one paper and compared it, while the other was read, and afterwards read it, how do you account for the fact that they are different at that point if they were originally alike?

A. He drew my attention to this, when I come to think of it. Mr. Elliott said when he was looking at it—when we decided to date it the 5th of December—he said he didn't come on the ground in possession till about the 10th, so he wrote 10th, I believe, in the original, and copied it the same way in this, the 10th of December. I knew those changes were not important;

(Testimony of Stanley Kuzek.)

they would not injure the agreement; and this agreement, as to the percentage and the time of the lay, they agreed in these papers.

Q. Now, isn't it a fact that the paper you held in your hand and the original were not exactly alike; they were different in this particular, that this written part down here—

A. The written part to this lay I didn't care to dispute over because that was past time already.

Q. Now, you don't know when you held this draft that these figures were in here and that they were not in the original?

A. I supposed he didn't put that 1903 because he was making this in 1904; in April this was drawn up.

Q. Why was this "1903" inserted in the draft at all?

A. Because this was drawn up beginning "1903," referring to the 5th of December.

Q. So you didn't know when you were reading over the original, when you got the word "1903" there, that they were omitted?

A. As I say, I didn't consider that was—I never expected any trouble whatever. If I was expecting any trouble I would have watched that wording and had it to be perfect.

Q. At whose suggestion were the words inserted in this that the claim was to be worked with at most eight men?

A. Yes, sir; that was inserted—that was important,

(Testimony of Stanley Kuzek.)

about how many men to work. I didn't want to give them the right to hire a hundred men or whatever they could to work out the whole claim, because I limited them as to the number of men they could work, and I limited the time. I was looking especially about the men and the percentage and the time which they were to keep the ground.

Q. Your idea was that you were getting such a small percentage that you didn't want them to work more than eight men?

A. I considered eight men a big crowd on that kind of ground. My idea was that they was working on a small percentage and to give them a big crowd of men to work, to take out this way—

Q. Why did you limit the number of men if you wanted them to have a big crowd?

A. I might just as well give them the whole thing if I didn't limit them.

Q. You expected that the cleanup in the spring would be $25,000?

A. I didn't expect any such a thing; there was people talking about that.

Q. Billy had told you that he thought there would be $25,000, hadn't he?

A. I was not positive. It is hard to estimate what a cleanup will be.

Q. What did you think the cleanup would be at that time? A. It was simply from thinking.

Q. What did you think?

(Testimony of Stanley Kuzek.)

A. Sometimes I might think there would be $100,000 in the claim.

Q. Did you think at that time that the cleanup was going to be $100,000? A. No, sir; I didn't.

Q. What did you think the cleanup was going to be at that time?

A. I thought if the ground held out well, until, say, June or the latter part of May, the cleanup would be between twenty-five and thirty thousand.

Q. And your share of that would be three-fourths then? A. Yes.

Q. You didn't count on the fact that you believed these laymen were going to clean up between twenty-five and thirty thousand dollars in the spring, and that your share of it would be 75 per cent, and that you still have the claim left—you were willing to sell the whole claim, together with another claim for $23,000, and only take $3,000 cash; that is a fact, isn't it?

A. I was expecting that—I was not sure of it—I always figure that one bird in the hand is better than a dozen in the bush.

Q. You knew that you were to get 75 per cent of what came out of the dump?

A. I didn't see the gold come out.

Q. You didn't see the gold?

A. That was in the dump; I didn't know how much.

Q. You panned the dumps?

A. I did some panning from samples that were taken out of the buckets.

(Testimony of Stanley Kuzek.)

Q. You thought it was better thing to get in your hand the $3,000 in cash, was it not?

A. And the rest of it was to be a short payment—to get $3,000 in my hands and also the claim until it was paid; I was to have security on the claim.

Q. You expected to get $3,000 in cash; then you were willing to accept your share of the cleanup to apply on the $23,000? A. Yes, sir.

Q. You believed there was going to be between twenty-five and thirty thousand dollars cleaned up from the dumps, and you were willing to take—you were also expecting to take the royalty and apply it on that $23,000, to secure you, did you not—whatever came out as royalty was to be paid to you also?

A. I would keep the claim in my possession until it was paid.

Q. You were to get $3,000 in cash?

A. Yes, and also short time on the balance.

Q. And also to get 75 per cent of the cleanup?

A. Yes, sir.

Q. Now, at that time, didn't you expect the $3,000, and the 75 per cent of the cleanup would amount to $23,000?

A. That was simply business—suppose your pay didn't hold out, then you didn't clean up that much.

Q. You would have the claim left besides?

A. Then I had the $3,000 down, and if they didn't make the payments, then I had the claim left.

Q. You never had much confidence in this claim?

(Testimony of Stanley Kuzek.)

A. I had that much confidence in 1902—that I held the claim since 1902.

Q. You felt confident that the pay was going to hold out and that you were going to get 75 per cent of the cleanup— A. Yes, sir, I did.

Q. You felt pretty confident that the cleanup was going to amount to between twenty-five and thirty thousand dollars, didn't you?

A. I thought if the pay held out, I say, and if it didn't, it wouldn't.

Q. You were confident that the pay was going to hold out? A. Yes.

Q. And, therefore, you must have been confident that the cleanup was going to be twenty-five or thirty thousand dollars? A. Yes, but I wasn't sure.

Q. You were absolutely sure that you had confidence in it? A. I had confidence in it.

Q. Notwithstanding that fact, then, that you were to have three-quarters of the cleanup, and you felt confident that the cleanup would be that much, you were willing to sell the whole claim for $23,000, together with another claim, and accept payment in the manner stated?

A. The other claim didn't amount to much—and even on that claim there wasn't a great deal left.

Q. You didn't expect these laymen to work the entire claim out, did you?

A. They worked out half of the good pay or more, as far as I know.

(Testimony of Stanley Kuzek.)

Q. You expected them to work out half or more of the good pay? A. Yes.

Q. At what time were you speaking when you state on direct examination that this claim is the richest claim in that vicinity—when did it become known to be the richest mining claim?

A. It became known to my knowledge in 1902, the early part of the summer or rather the beginning of the winter.

Q. That was the early part of the summer when?

A. 1902.

Q. Ever since then you have known it was the richest mining claim in that vicinity? A. Yes, sir.

Q. You knew that in the fall of 1903, did you?

A. 1903, yes.

Q. What time of the day was this original lease drawn up? A. Shortly after noon, after dinner.

Mr. BRUNER.—Object to the question on the grounds that this matter has been very fully gone into before on this matter.

The COURT.—Objection overruled.

Q. What time did you finish it?

A. Shortly after commencing; it didn't last very long.

Q. It was about 2 o'clock in the afternoon when you got through? A. Yes, about that time.

Q. 1:30 or 2 o'clock; about 2:30, wasn't it?

A. I would not say the exact time; it would not be

(Testimony of Stanley Kuzek.)

half-past two, because Mr. Elliott and Magaha was to be there at 3 o'clock in town. I could not say; it was somewhere 2 o'clock—whether after or before I could not state.

Q. It was after 2 o'clock, wasn't it?

A. It might have been after 2.

Q. As soon as you drew it up, Elliott and Magaha came to town with it? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. You are positive that was the 9th of March?

A. Yes, sir.

Q. What makes you absolutely positive on that subject? A. The date of the time it was drawn up?

Q. Yes?

A. What makes me think about it is that Mr. Elliott when he made the writing, was looking at the calendar, and he says, "What is the date—the 9th?" I says, "This is started." I started to draw it up, and dated it the 9th of December. It might be all right to date it at that time, as it being begun. He says, "That will be all right."

Q. That is the reason why you remember?

A. Yes; if it is necessary, I can give you an explanation.

Q. Was Mrs. Kuzek there when Mr. Elliott looked at the calendar and said it was the 9th?

A. The 9th of the month, yes, sir.

Q. Mrs. Kuzek was present?

A. I think she was.

(Testimony of Stanley Kuzek.)

Q. She was right there?

A. I don't know whether she was sitting down; she was on the opposite side of the table.

Q. She was in the room?

A. Yes, sir; I don't know whether she took notice of that or not.

Q. Of course not. I knew you didn't know whether she was there or not? Was Mr. Taylor there that day?

A. No, sir. There would not be no time.

Q. Was he ever there before then?

A. He was, yes sir.

Q. How many times?

A. One that I know of before that.

Q. When was it—how long before that.

A. It was—whether it was the 3d or 4th of March—it was in that neighborhood.

Q. Was Mr. Cowden there?

A. No, sir; I never saw Mr. Cowden there. I heard he was there, but I didn't see him.

Q. When was it that you heard he was there?

A. I think it was later, sometime later—whether a week or two, I could not say.

Q. Isn't it a fact that they were both there the day before the paper was signed on the 8th?

A. If they were there, I could not say.

Q. You heard they were there?

A. Yes, sir; I heard they were there.

(Testimony of Stanley Kuzek.)

Q. You knew that Mr. Taylor was there the 3d or 4th of March? A. Yes, sir.

Q. That you know of your own knowledge?

A. Yes, sir.

Q. Did you know at that time what Mr. Taylor was there for? A. I didn't know.

Q. Do you know what Mr. Cowden and Taylor were there for when they were together?

A. I didn't know, sir.

Q. Do you remember whether or not—do you remember when Mr. Taylor was there at the time you saw him personally—isn't it a fact you had some conversation in the boiler-room with him?

A. Shall I repeat the conversation?

Q. Isn't it a fact that you had some conversation there? A. A very few words.

Q. Mr. Taylor had been down in the drift, the workings of the claim? A. That is what I heard.

Q. Didn't he bring some dirt back and pan it there?

A. When I came in the engine-room Mr. Elliott had the pan and had it worked pretty well down panning. I was looking for a pan to go down and get some dirt, and I stopped there a few minutes, and he had it about pretty near cleaned, and I says, "What do you think of it, Mr. Taylor?" And he says, "That is about as good as I have seen in this country." I went down into the drift and I left them in the engine-room.

Q. That was all the talk that you had?

(Testimony of Stanley Kuzek.)

A. That was all the talk we had.

Q. You are positive nothing was said about the lay?

A. No, sir, not to me personally.

Q. Didn't you tell Elliott in the presence of Taylor that he could have the papers drawn up right away and take them to town? A. No, sir.

Q. You are absolutely positive of that?

A. Absolutely positive.

Q. And didn't Mr. Taylor ask Mr. Elliott in your presence what kind of a lay he had?

A. No, sir.

Q. Nothing of that kind ever occurred?

A. No, sir, nothing of that kind ever occurred.

Q. Nothing of that kind ever occurred?

A. Nothing of that kind ever occurred.

Q. You are absolutely positive, are you, that you have never told anybody at all that Elliott and Magaha were to receive 75 per cent of the golddust that came out of this claim, or anything of that kind?

A. No, sir.

Q. You are absolutely positive, are you, that you have never told anybody that Mr. Elliott and Magaha were to receive 75 per cent?

A. No, sir—I am positive.

Q. You are positive? A. Yes, sir.

Q. You heard these gentlemen testify on the stand that you told them that? A. Yes, sir.

Q. Every one of them is telling a lie?

(Testimony of Stanley Kuzek.)

A. I should say they did. They told me lies in the bank. Mr. Cowden told me twice that it was 25 per cent to the lessor instead of 75.

Q. Mr. Cowden read the paper over and handed it back to you and says that the paper itself right on the face of it says that you were to receive 25 per cent?

A. That is what he said.

Q. How did you happen to save the pencil memorandum, Mr. Kuzek? A. How did I happen to save it?

(Question read.)

A. I didn't get the duplicate, so I thought I would keep that in the event anything turned up and I didn't have a duplicate of it. I was supposed to keep that.

Q. You had been working for several months without a paper at that time? A. Yes, sir.

Q. You never felt uneasy about it?

A. Well, there was no paper on either side then.

No paper on either side then. I thought if there was any controversy, we would have just as good a chance as they would.

Q. Did you expect any controversy at that time?

A. No, sir.

Q. After the paper was made out, did you expect to have any controversy?

A. I didn't pay much attention to it; I was waiting patiently until Elliott got sobered up, and I could get him to draw the paper up for me. I didn't pay much attention to what was going to.

(Testimony of Stanley Kuzek.)

Q. Why did you save the pencil memoranda, then, after you got the other one?

A. I kept it with the other papers we had there; it didn't take extra room for it.

Q. Why was it that you were willing to let these parties work there on an oral lay when you were to receive 75 per cent of the gross output—why didn't you have it reduced to writing in the first place?

A. It was understood that sooner or later we were to draw up the paper, and we neglected it from day to day.

Redirect Examination.

(By Mr. BRUNER.)

Q. I present to you a paper marked "Plaintiff's Exhibit No. 3," and ask you whether or not that paper has had any words added to it since it was drawn up on the 9th day of March of this year—have any words been written or letters or figures since the 9th day of March, 1904?

A. No, sir, there is nothing added to it.

Q. That paper is as it was filled out that day?

A. Yes, sir.

Mr. BRUNER.—That is all.

Redirect.

Q. I present to you the paper marked "Plaintiff's Exhibit No. 3," and ask whether or not that paper has

(Testimony of Stanley Kuzek.)

had any words or figures added to it since it was drawn up on the 9th day of March of this year?

A. No, sir, nothing has been added to it: the paper is now as it was filled out that day.

Mr. ORTON.—We offer in evidence the affidavits of Mr. and Mrs. Kuzek.

Mr. BRUNER.—Objected as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled. Papers admitted.

(Affidavit of Stanley Kuzek marked "Defendants' Exhibit No. 4." Affidavit of Bertha Kuzek marked "Defendants' Exhibit No. 5.")

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff.

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,
Defendants.

## Opinion.

This cause coming on regularly for trial before the Court, and the parties being present, and appearing also by counsel, and having offered their evidence respectively, and the cause having been argued by counsel for plaintiff and defendants, and having been submitted

to the Court, and the Court having duly considered the same and being sufficiently advised in the premises, now

Finds that the allegations of the plaintiff's complaint have not been sustained by the evidence, and further finds that the allegations of the defendants' answer as to the terms of the original lease have been clearly and convincingly sustained by the evidence; therefore, the Court

Orders that proper findings and decree be prepared in accordance with this memo. opinion, and submitted to the Court.

Dated, Nome, Alaska, July 23d, 1904.

ALFRED S. MOORE,
District Judge.

*In the United States District Court for the District of Alaska, Second Dirision.*

STANLEY KUZEK,
Plaintiff,

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,
Defendants.

## Findings of Fact and Conclusions of Law.

The above-entitled action came on regularly for trial before the Court without a jury at a special term of said court, begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April,

1904, and was tried on the 11th, 12th, 13th, 14th and 15th days of July, 1904. Messrs. A. J. and Elwood Bruner appearing as plaintiff's attorneys, and Messrs. Jno. L. McGinn and Ira D. Orton appearing for the defendants, and said cause having been tried and argued by counsel, and submitted to the Court, and taken under advisement, now at the next special term of said court, begun and holden at said town of Nome, commencing July 13th, 1904, the Court makes in said cause findings of fact and conclusions of law as follows:

I.

Plaintiff is, and was at all times mentioned in the complaint and answer, the owner of the placer mining claim in complaint described.

II.

On or about November 18th, 1903, plaintiff agreed with the defendants orally to allow them to prospect a few days on the said placer mining claim mentioned in plaintiff's complaint with a view of letting defendants have a lay on said premises. After defendants had prospected a few days, and on or about November 20th, 1903, the plaintiff and defendants agreed that defendants might continue working said property on a lay of 25 per cent to the owner and 75 per cent to the defendants. Thereafter and on or about the 11th day of December, 1903, defendants commenced working continuously on said claim with boiler and thawing apparatus, under and in pursuance to said oral agreement, and thereafter continued to work, operate and mine said

property, but without sluicing the same, until on or about the 4th day of March, 1904. Prior to said 4th day of March, 1904, there was no written contract or lease entered into between the plaintiff and defendants in relation to working, mining or operating said property. On or about said 4th day of March, 1904, plaintiff and defendants agreed to reduce said oral lay to writing, and thereupon the defendant Elliott, using a blank form of lease, drew up a lay of said premises, in words and figures in substance as set forth in paragraph II of plaintiff's complaint, save and except that said lay lease then so drawn up by said defendant Elliott, provided for the payment of 25 per cent of the gross output of said claim to plaintiff Stanley Kuzek, lessor, instead of 75 per cent as stated in the lease set forth in paragraph II of plaintiff's complaint. Said lease so drawn up by defendant Elliott, which provided for the payment of 25 per cent of the gross output of said claim to said Stanley Kuzek, instead of 75 per cent, was on said 4th day of March, 1904, actually signed by defendants and plaintiff, and delivered to defendants, and is and was, at all times herein mentioned, the original lease of the said premises, entered into in writing between the parties hereto. At the request of plaintiff said lease was, by the parties, dated back so as to appear to have been entered into and executed on the 5th day of December, 1903, although the same was never drawn up, signed, executed or delivered until on or about said 4th day of March, 1904. After said 4th day of March, 1904, continuously until this action was commenced, and the in-

junction issued herein, said defendants continued to work, mine and operate said mine and mining claim in complaint described, under and pursuant to said original lease aforesaid.

III.

Afterwards, and on or about the 3d day of April, 1904, at the request of said plaintiff, the said defendant Elliott drew up a duplicate of said original lease to be retained by the plaintiff Kuzek; in drawing up said duplicate, defendant Elliott used the same kind of a printed blank as was used by him for said original lease, but in copying and drawing the same said Elliott erroneously and inadvertently wrote in "75 per cent" to be paid to the lessor instead of "25 per cent," which was written in said original lease. Said duplicate of said lease so drawn upon said 3d day of April, 1904, in which said mistake was made as aforesaid, was signed by the plaintiff and defendants, and delivered to said Kuzek, and said duplicate is the document set forth in paragraph II of plaintiff's complaint. In signing and executing said duplicate the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said duplicate to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff.

The mistake made by plaintiff and defendants in copy-

ing and signing said lease was mutual and was inadvertently made by said Elliott in copying said original lease, and was unknown to either the plaintiff or defendants until considerable time afterwards.

Said duplicate lease does not and did not express the true agreement between the parties as set forth in the original agreement entered into between them, but by said mistake and inadvertence aforesaid it was made to appear thereby that the plaintiff lessor was entitled to 75 per cent of the gross output of said claim, whereas in fact the true mutual agreement between the parties was and is that the defendants were and are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent, and it was not intended by drawing up and signing and executing said duplicate lease to change or modify in any particular the original lease in writing entered into between the parties aforesaid.

IV.

Said original lease so signed, entered into and executed by plaintiff and defendants on said 4th day of March, 1904, has been by the defendants inadvertently lost or mislaid, and for that reason they cannot produce the same. Said original lease was, however, in substance the same as the duplicate thereof, set forth in plaintiff's complaint, except that it provided for the payment to the plaintiff Kuzek of 25 per cent instead of 75 per cent of the gross output of said claim. Defendants have made careful and diligent search for said original lease, but are and have been unable to find the same.

V.

On the 23d of May, the defendants having made a cleanup of 54 8-100 ounces of gold from said claim, described in plaintiff's complaint, in company with plaintiff carried the same to the Alaska Banking and Safe Deposit Company's office in Nome, Alaska, for the purpose of having the same assayed and selling the same to said bank and dividing the proceeds between the plaintiff and defendant. After the 23d day of May, 1904, the defendants continued to sluice the dumps of pay gravel on said premises, and on the 28th day of May, 1904, brought into the town of Nome, in company with this plaintiff, 126 69-100 ounces of gold.

VI.

On both said occasions, to wit, the 23d day of May and the 28th day of May, 1904, the plaintiff demanded that the defendants pay and deliver to him 75 per cent of the gross output, and defendants refused to make such a division of the said gold, and refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust, which amount defendants offered to plaintiff.

VII.

After the commencement of this action, by stipulation of the parties, one Frank Place, was appointed by the court receiver to sluice and extract the gold from the dumps of pay gravel mined from said claim by said defendants Magaha and Elliott, and said receiver thereupon took possession of the same and sluiced said dumps

and cleaned up from the same 1341.90 ounces of gold. Said first lot of gold sluiced from said claim by the defendants amounting 54.08 ounces, was delivered by said defendants to the said Alaska Banking and Safe Deposit Company, and said second lot of gold sluiced from said claim by defendants was by defendants delivered to and accounted for by said receiver in his account. The total amount of gold mined and sluiced from said claim by the defendants and by said receiver amounted to 1522.67 ounces, and by stipulation of the parties one-quarter (¼) of said amount has been paid and delivered to plaintiff, and one-quarter to defendants, and after allowing to said receiver all his expenses and compensation, there now remains 625.67 ounces of golddust and 366 86-100 dollars in cash, which, by the order of the Court, has been deposited with the Alaska Banking and Safe Deposit Company at Nome, Alaska, to await the judgment of the Court in this action.

VIII.

The defendants at all times have fully and faithfully performed all the conditions and covenants of said original lease of the premises in complaint described, entered into and signed on or about March 4th, 1904.

And as to conclusions of law from the foregoing facts, the Court finds that the defendants are entitled to judgment and decree in their favor, adjudging:

First.—That the injunction heretofore granted herein be dissolved.

Second.—That said duplicate lease signed and executed by plaintiff and defendants on or about April 3d, 1904, be corrected and reformed by changing the words "75 per cent" therein, to "25 per cent."

Third.—That the defendants were and are the owners of, and entitled under their original lease of said premises, and under said duplicate as thus reformed and corrected to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent, and that defendants are entitled to have paid and deliered to them the balance of 625.67 ounces of gold, and 366.86/100 dollars in money, now on deposit with the Alaska Banking and Safe Deposit Company.

Fourth.—That defendants are entitled to judgment against plaintiff, for their costs and disbursements.

Let judgment and decree be entered accordingly.

Done in open court this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the District Court, District of Alaska, Second Division.

[Endorsed]: Filed July 30th, 1904. Geo. V. Borchsenius, Clerk. By J. H. Dunn, Deputy Clerk.

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHARLES F. MAGAHA, and WILLIAM ELLIOTT,
Defendants.

**Decree.**

The above-entitled cause having been tried at the last special term of the above-entitled court, which was begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April, 1904, and having being argued by counsel and submitted to the Court for decision and the Court afterwards on the 30th day of July, 1904, at the next special term of said court which was begun and holden at said Nome aforesaid, commencing on the 18th day of July, 1904, having decided said cause and made, signed and filed herein its findings of fact and conclusions of law, and ordered judgment and decree to be entered in accordance therewith—

Now, therefore, by virtue of the law and the premises aforesaid, it is by the Court now ordered, adjudged and decreed, as follows, to wit:

First.—That the injunction heretofore issued herein be and the same is hereby dissolved.

Second.—That the duplicate lease being the instrument set forth in paragraph II of plaintiff's complaint,

dated December 5th, 1903, which was signed and executed by the plaintiff and defendants on or about April 3d, 1904, be and the same is hereby corrected and reformed by changing the words "75 per cent" therein, to "25 per cent."

Third.—That the defendants were and are the owners of and entitled, under their original lease of the premises in the complaint described, and under said duplicate lease as thus corrected and reformed to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent thereof.

Fourth.—That the Alaska Banking and Safe Deposit Company pay over and deliver to defendants the balance of the gold and proceeds thereof extracted from said claim by the receiver, now on deposit with said company, amounting to 625.67 ounces of gold and 366 86/100 dollars in money.

Fifth.—That defendants have and recover from plaintiff their costs and disbursements incurred herein amounting to ——— dollars.

Done in open court at Nome, Alaska, this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the United States District Court, District of Alaska, Second Division.

[Endorsed]: Filed July 30th, 1904. Geo. V. Borchsenius, Clerk. By J. H. Dunn, Deputy Clerk.

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHARLES F. MAGAHA, and WILLIAM ELLIOTT,

Defendants.

**Motion for New Trial.**

Now comes the plaintiff by A. J. Bruner and Elwood Bruner, his attorneys, and asks that the Court grant a new trial of this cause, for the following reasons, viz.:

I.

Insufficiency of the evidence to justify the verdict or other decision, and that the said decision is against law.

II.

Errors in law occurring at the trial and excepted to by the plaintiff, and in particular the plaintiff states the following reasons:

a. The Court erred in admitting evidence concerning the negotiations which led up to the reduction of the contract to writing.

b. The Court erred in admitting evidence in contradiction of the verified answer of the defendants.

c. The Court erred in admitting evidence of such a contract as set forth in the complaint, in the vicinity of the claim described in the complaint.

d. The Court erred in the admission of oral evidence as to the contents of what is known as the pencil copy of the original agreement.

e. The Court erred in the admission of any evidence to contradict the written terms of the instrument introduced by plaintiff, and known as and admitted as the copy of copy or duplicate of the original instrument.

f. The Court erred in giving its opinion in said cause.

g. The Court erred in dissolving the injunction in favor of the plaintiff heretofore granted.

h. The Court erred in the admission of oral evidence of the original agreement.

i The Court erred in rendering judgment for defendants.

A. J. BRUNER and
ELWOOD BRUNER,
Attorneys for Plaintiff.

Service of the above by copy admitted this 1st day of August, 1904.

J. L. McGINN,
IRA D. ORTON,
Attorneys for Defendants.

[Endorsed]: Filed Aug. 1, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk.

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,
vs.
CHARLES F. MAGAHA et al.
No. 1122.

**Order Overruling Motion for New Trial.**

This cause having been heretofore argued and submitted to the Court on a motion for a new trial made therein, and the Court having carefully considered the same, does now—

Order that said motion be, and the same is hereby, overruled.

Nome, Alaska, September 19th, 1904.

ALFRED S. MOORE,
District Judge.

Service of the foregoing proposed bill of exceptions by copy is hereby admitted this 5th day of October, 1904.

IRA D. ORTON,
Attorney for Defendants.

*In the United States District Court for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHARLES F. MAGAHA, and WILLIAM ELLIOTT,
Defendants.

**Stipulation as to Bill of Exceptions.**

It is hereby stipulated by and between counsel for plaintiff and counsel for the defendants in the above-entitled cause that the above bill of exceptions is served, filed, presented and allowed in due time.

Done at Nome, Alaska, this 15th day of June, A. D. 1905.

A. J. BRUNER, and
ELWOOD BRUNER,
Attorneys for Plaintiff.
IRA D. ORTON,
Attorney for Defendants.

And now in furtherance of justice, and that right may be done the plaintiff presents the foregoing as his bill of exceptions in this cause and prays that the same may be settled and allowed, and signed, and certified by the Judge, as provided by law.

A. J. BRUNER,
ELWOOD BRUNER,
Attorneys for Plaintiff.

And now upon motion of counsel for the plaintiff, it is ordered and decreed that the foregoing bill of exceptions be, and the same is hereby, approved, allowed and settled, and made a part of the record herein.

Done in open court this 15th day of June, A. D. 1905.

ALFRED S. MOORE,
District Judge.

[Endorsed]: No. 1122. District Court, United States, District of Alaska, Second Division. Stanley Kuzek, vs. Chas. F. Magaha et al. Bill of Exceptions. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. Oct. 5, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner and Elwood Bruner, Attorneys for Plaintiff. Refiled in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. June 15, 1905. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. McB.

*In the United States District Court, in and for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

**Petition for Appeal in Equity and Order Allowing Same.**

Comes now Stanley Kuzek, the plaintiff in the above-entitled action, and conceiving himself aggrieved by the judgment and decree made and entered in said cause on the 30th day of July, A. D. 1904, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. The following is a copy of the judgment and decree appealed from:

*"In the United States District Court, for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

The above-entitled cause having been tried at the last special term of the above-entitled court, which was begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April, 1904, and having been argued by counsel and submitted to the Court for decision, and the Court afterwards, on the 30th day of July, 1904, at the next special term of said court which was begun and holden at said Nome aforesaid, commencing on the 18th day of July, 1904, having decided said cause, and made, signed and filed herein its findings of fact and conclusions of law, and ordered judgment and decree to be entered in accordance therewith;

Now, therefore, by virtue of the law and the premises aforesaid, it is by the Court now ordered, adjudged and decreed, as follows, to wit:

First.—That the injunction heretofore issued herein be, and the same is hereby, dissolved.

Second.—That the duplicate lease being the instrument set forth in paragraph II of plaintiff's complaint, dated December 5th, 1903, which was signed and executed by the plaintiff and defendants on or about April

3d, 1904, be, and the same is hereby, corrected and reformed by changing the word "75 per cent" therein to "25 per cent."

Third.—That the defendants were and are the owners of and entitled, under their original lease of the premises in the complaint described, and under said duplicate lease as thus corrected and reformed to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent thereof.

Fourth.—That the Alaska Banking and Safe Deposit Company pay over and deliver to defendants the balance of the gold and proceeds thereof extracted from said claim by the receiver now on deposit with said company, amounting to 625.67 ounces of gold and 366 86-100 dollars in money.

Fifth.—That defendants have and recover from plaintiff their costs and disbursements incurred herein, amounting to ——— dollars.

Done in open court at Nome, Alaska, this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the United States District Court, District of Alaska, Second Division.

Filed in the office of the clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. July 30th, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk."

Done in open court this 15th day of June, A D. 1905.

A. J. BRUNER and
ELWOOD BRUNER,
Attorneys for Plaintiff.

Service of a true copy of the above petition is hereby accepted this 15th day of June, A. D. 1905.

IRA D. ORTON,
Attorney for Defendants.

Order Allowing Appeal.

The foregoing petition is hereby granted, and it is ordered that the appeal mentioned therein be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of $2,500, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Done at Nome this 15th day of June, A. D. 1905.

ALFRED S. MOORE,
District Judge.

*In the United States District Court, in and for the District of Alaska, Second Division.*

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

**Assignment of Errors.**

Comes now the complainant in the above-entitled cause, and filed the following assignment of errors, upon which he will rely upon his appeal from the decree made by this Honorable Court, on the 30th day of July A. D. 1905, in the above-entitled cause.

I.

The Court erred in permitting the witness Elliott, over plaintiff's objection, to testify that he had showed the original agreement, from which the witness testified that he had copied the duplicate to Mr. Taylor, Mr. Cowden, Mr. Strelke, Judge Reed and other persons.

II.

The Court erred in permitting the witness Magaha, called on behalf of the defendants, to testify against the objections of plaintiff as to what the wording of the original lease was.

III.

The Court erred in permitting D. M. Taylor, called on

behalf of defendants, to testify against the objection of plaintiff as to what royalty the original lease provided.

IV.

The Court erred in permitting the witness Cowden, called on behalf of defendants, to testify against the objections of plaintiff as to his reason for examining the lease, submitted to him by the defendants.

V.

The Court erred in permitting the witness Taylor, over plaintiff's objection, to testify as to a conversation between himself and the plaintiff and defendants as to the terms of the lease, which conversation was held prior to the reduction of the lease to writing.

VI.

The Court erred in permitting the witness D. M. Taylor to answer the following questions, the same having been objected to by plaintiff:

"Q. Are you familiar with the amount of royalty which is usually paid or reserved by the lessor and lessee upon claims of the character and description as found on the Marion Bench Claim?"

To which question the witness replied:

"A. I am."

"Q. I will ask you if you are acquainted with the range of percentage which was paid to the lessor upon ground of the character and description of the Marion Bench Claim during the past year or two years?"

To which the witness replied:

"A. I am."

"Q. I will ask you to state what that percentage is or was during that period?"

To which the witness replied:

"A. Twenty-five per cent was paid to the lessor—I could not say—I know of a great number."

"Q. I will ask you to state what is the highest percentage you have ever known to be paid on ground of a similar nature as that of the Marion Bench Claim?"

To which the witness replied:

"A. The highest percentage I know to have been paid on ground similar to this along the Beach line is 25 per cent to the lessor."

VII.

The Court erred in permitting the witness C. G. Cowden, over the objections of plaintiff, to testify as to the usual rate of royalty that is to be paid upon mines at and near Peluk creek, of the same kind and character as the Marion Bench claim.

VIII.

The Court erred in permitting the witness G. W. Marsh to testify as to a conversation held by him with the plaintiff concerning the terms of the lease, which conversation occurred prior to the reduction of the lease of plaintiff to defendants to writing.

IX.

The Court erred in permitting the witness G. W. March and Thomas Jacobs to testify as to the usual

amount of royalty paid on claims situated in the vicinity of the claim in dispute.

X.

The Court erred in permitting the witness John Greve to testify as to the conversation held with the plaintiff concerning the terms of the lease between plaintiff and defendants, which conversation was held more than three months prior to the time when the lease was reduced to writing.

XI.

The Court erred in permitting the witness T. M. Reed to testify as to the reason why the defendants Magaha and Elliott and C. G. Cowden and D. M. Taylor brought the original lease to him.

XII.

The Court erred in permitting the defendant Elliott to testify as to a conversation held between himself, D M. Taylor, and the plaintiff as to the terms of the lease, which conversation was held before the contract of lease was reduced to writing.

XIII.

The Court erred in denying and overruling the plaintiff Kuzek's motion for a new trial.

XIV.

The Court erred in rendering a decree that the injunction heretofore issued in this cause be, and the same is hereby, dissolved.

XV.

The Court erred in rendering a decree that Plaintiff's Exhibit No. 2 be reformed by striking out the figure "75" in paragraph 4 thereof, and answering in lieu thereof the figures "25."

XVI.

The Court erred in rendering a decree in favor of defendants Chas. F. Magaha and William Elliott, and against the plaintiff Stanley Kuzek.

XVII.

The Court erred in not making, rendering and entering a decree in favor of the said plaintiff Stanley Kuzek, and against the defendants Chas. F. Magaha and Wm. Elliott, adjudging that plaintiff was entitled to an accounting of the gold extracted by defendants, and that plaintiff required 75 per cent of the gross proceeds of gold taken by defendants from the premises described in plaintiff's complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainants present the same to the Court, and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and complainants pray a reversal of the decree be made and entered by said Court.

A. J. BRUNER,

ELWOOD BRUNER,

Attorneys for Plaintiff.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Petition for Appeal in Equity and Assignment of Errors. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska, June 15, 1905. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. Vol. 3, Orders and Judgments, page 322. A. J. Bruner and Elwood Bruner, Attorneys for Plaintiff.

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*In the United States District Court in and for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

## Bond on Appeal.

Know all men by these presents, that we, Stanley Kuzek, as principal, and D. W. McKay and H. B. Ames, as sureties, are held and firmly bound unto Chas. F. Magaha and Wm. Elliott in the full and just sum of two thousand five hundred dollars, to be paid to the

said Chas. F. Magaha and Wm. Elliott, his attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of June, A. D. 1905.

The condition of this obligation is such, nevertheless, that whereas lately at a session of the District Court of the United States, in and for the District of Alaska, Second Division thereof, held in the town of Nome, in said district, in a suit pending in said court between the said Stanley Kuzek, plaintiff, and Chas. F. Magaha and Wm. Elliott, defendants, a decree was rendered against the said Stanley Kuzek; and the said Stanley Kuzek having obtained from said United States District Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree of the aforesaid suit, and a citation directed to the said named defendants is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California.

Now, the condition of the above obligation is such, that if the said plaintiff on appeal shall prosecute his said appeal to effect, and answer all damages and costs

that may be awarded against him, if he fails to make his appeal good, then this obligation to be void; otherwise to remain in full force and virtue.

STANLEY KUZEK, [Seal]
Principal.

D. W. McKAY. [Seal]

H. B. AMES. [Seal]

_____. [Seal]

Executed in the presence of:

G. J. LOMEN.

O. K.—IRA D. ORTON.

United States of America,
District of Alaska. } ss.

D. W. McKay and H. B. Ames, being first duly sworn, each for himself deposes and says:

That he is the identical person who signed, subscribed and executed the foregoing bond as surety thereon; that he is a resident of the District of Alaska; that he is not an attorney, counselor at law, marshal or deputy marshal, commissioner or clerk of any court, or other officer of any court; that he is worth the sum of $2,500.00 over and above all debts and liabilities and exclusive of property exempt from execution.

D. W. McKAY.

H. B. AMES.

Subscribed in my presence and sworn to before me this 19th day of June, A. D. 1905.

[Notarial Seal] G. J. LOMEN,

Notary Public in and for the District of Alaska.

The foregoing bond is hereby approved this 21st day of June, A. D. 1905.

ALFRED S. MOORE,

United States District Judge.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Bond on Appeal. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. Jun. 21, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. L. Civil Bonds No. 3, page 104. A. J. Bruner, Attorney for Plaintiff.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

**Stipulation Enlarging Time to File Transcript.**

It is hereby stipulated by and between the above-named parties, appellant and respondents that the time for the petitioners in error to file the transcript of the record and to docket the above-entitled cause on appeal with the clerk of the Circuit Court of Appeals for the Ninth Circuit, may be enlarged to and including the 16th day of August, 1905.

Dated at Nome, Alaska, this 11th day of July A. D. 1905.

A. J. BRUNER,
Attorney for Appellant.

IRA D. ORTON,
Attorney for Respondent.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondents. Stipulation. A. J. Bruner, Attorney for Appellant.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

STANLEY KUZEK,
Appellant,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Respondents.

**Order Enlarging Time to File Transcript.**

Now at this day comes the appellant by A. J. Bruner, Esq., of counsel, and upon the written stipulation of counsel, for the appellant and respondents, and thereupon this cause coming on to be heard upon the motion of said stipulation for the extension of time in which to file the transcript herein, in the United States Circuit Court of Appeals for the Ninth Circuit it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to August 16th, 1905.

ALFRED S. MOORE,
Judge of the District Court, for the District of Alaska, Second Division.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondent Order Enlarging Time to File Transcript. A. J. Bruner, Attorney for Appellant.

*In the District Court in and for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.
No. 1122.

## Clerk's Certificate to Transcript.

I, Geo. V. Borchsenius, clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 174, both inclusive, is a true and exact transcript of the complaint, summons, answer, amendments to complaint, reply, bill of exceptions, petition for appeal, order allowing appeal and assignment of errors, bond on appeal, order extending time to docket transcript, in the case of Stanley Kuzek vs. Chas. F. Magaha and Wm. Elliott, Number 1122, this court and of the whole thereof as appears from the records and files in my office at Nome, Alaska; and further certify that the original citation in the above-entitled cause is attached to this transcript.

Cost of transcript $52.70, paid by A. J. Bruner, attorney for plaintiff.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of July, A. D. 1905.

[Seal] GEO. V. BORCHSENIUS,
Clerk.

By Angus McBride,
Deputy Clerk.

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*In the United States District Court, in and for the District of Alaska, Second Division.*

STANLEY KUZEK,
Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

**Citation.**

United States of America—ss.

The President of the United States of America, to Chas. F. Magaha and Wm. Elliott, the Defendants Above Named, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California,

within 30 days from the date of this writ pursuant to an appeal filed in the clerk's office of the District Court of the United States, for the District of Alaska, Second Division, wherein Stanley Kuzek is plaintiff and Chas. F. Magaha and Wm. Elliott are defendants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 22d day of June, A. D. 1905, and of the independence of the United States, the 129th.

ALFRED S. MOORE,
United States District Judge for the Second Division of the District of Alaska.

[Seal] Attest: GEO. V. BORCHSENIUS,
Clerk.

By Angus McBride,
Deputy Clerk.

Personal service of the foregoing citation is hereby admitted at Nome, Alaska, this 22 day of June, A. D. 1905.

IRA D. ORTON,
Attorney for Defendants Chas. F. Magaha and Wm. Elliott.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Citation. Filed in the office of the Clerk of

the District Court of Alaska, Second Division, Nome, Alaska, June —, 1905, Geo. V. Borchsenius, Clerk. By ————————, Deputy Clerk.

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[Endorsed]: No. 1220. United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed July 24, 1905.

F. D. MONCKTON,
Clerk.